DOCKET

No. 07-1372
Title: Hawaii, et al., Petitioners
v.
Office of Hawaiian Affairs, et al.
Docketed: May 2, 2008
Lower Ct: Supreme Court of Hawaii
Case Nos.: (25570)
Decision Date: January 31, 2008
Questions Presented

---Date---	---------Proceedings and Orders----------
Apr 29 2008	Petition for a writ of certiorari filed. (Response due June 2, 2008)
May 7 2008	Order extending time to file response to petition to and including July 2, 2008, for all respondents.
Jun 2 2008	Brief amicus curiae of Pacific Legal Foundation filed.
Jun 2 2008	Brief of respondents Office of Hawaiian Affairs, et al. in opposition filed.
Jun 2 2008	Brief amicus curiae of Commissioner of Public Lands for the State of New Mexico filed.
Jun 2 2008	Brief amici curiae of Washington, et al. filed.
Jul 14 2008	Reply of petitioners Hawaii, et al. filed.
Jul 16 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Petition GRANTED.
Nov 6 2008	Letter from counsel for the petitioners consenting to the filing of amicus curiae briefs, in support of either or neither party, filed.
Nov 12 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including December 4, 2008.
Nov 12 2008	The time within which to file respondents' brief on the merits is extended to and including January 21, 2009.
Dec 1 2008	Letter from counsel for the respondents consenting to the filing of amicus curiae briefs in support of either or neither party filed.
Dec 4 2008	Joint appendix filed. Statement of costs received.
Dec 4 2008	Brief of petitioners Hawaii, et al. filed.
Dec 8 2008	SET FOR ARGUMENT ON Wednesday, February 25, 2009.
Dec 11 2008	Brief amicus curiae of United States filed.
Dec 11 2008	Brief amicus curiae of Mountain States Legal Foundation filed.
Dec 11 2008	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Dec 11 2008	Brief amici curiae of Grassroot Institute of Hawaii, et al. filed.
Dec 11 2008	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Dec 11 2008	Brief amici curiae of Washington, et al. filed.
Dec 11 2008	Brief amicus curiae of Commissioner of Public Lands for the State of New Mexico filed.
Dec 19 2008	CIRCULATED.
Dec 31 2008	Record received from the Supreme Court of Hawaii. (1 box)
Jan 8 2009	Record received from the First Circuit Court of Hawaii. (11 boxes)
Jan 12 2009	The time within which to file respondents' brief on the merits is extended to and including January 22, 2009.

Jan 22 2009	Brief of respondents Office of Hawaiian Affairs, et al. filed. (Distributed)
Jan 28 2009	Brief amici curiae of Native Hawaiians, Samuel L. Kealoha, et al. filed. (Distributed)
Jan 29 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 29 2009	Brief amici curiae of Native Hawaiian Legal Corporation, et al. filed. (Distributed)
Jan 29 2009	Brief amici curiae of Asian American Justice Center, et al. filed. (Distributed)
Jan 29 2009	Brief amicus curiae of Hawai'i Congressional Delegation filed. (Distributed)
Jan 29 2009	Brief amicus curiae of Abigail Kinoiki Kekaulike Kawananakoa filed. (Distributed)
Jan 29 2009	Brief amici curiae of Sovereign Councils of the Hawaiian Homelands Assembly, et al. filed. (Distributed)
Jan 29 2009	Brief amicus curiae of Alaska Federation of Natives, Inc. filed. (Distributed)
Jan 29 2009	Brief amici curiae of Current and Former Hawaii State Officials filed. (Distributed)
Jan 29 2009	Brief amici curiae of Equal Justice Society, and Japanese American Citizens League filed. (Distributed)
Jan 29 2009	Brief amicus curiae of National Congress of American Indians filed. (Distributed)
Feb 3 2009	Corrected Petition Appendix A filed. (Distributed)
Feb 6 2009	Reply of petitioners Hawaii, et al. filed. (Distributed)
Feb 20 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 25 2009	Argued. For petitioner: Mark J. Bennett, Attorney General, Honolulu, Haw.; and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Kannon K. Shanmugam, Washington, D.C>

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PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

(1) 071372 APR 29 2008

OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29 percent of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Supreme Court of Hawaii were:

Office of Hawaiian Affairs; Rowena Akana, Haunani Apoliona, Dante Carpenter, Donald Cataluna, Linda Dela Cruz, Colette Machado, Boyd P. Mossman, Oswald Stender, and John Waihe'e, IV, in their official capacities as members of the Board of Trustees of the Office of Hawaiian Affairs; Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'ai'ai, and Keoki Maka Kamaka Ki'ili (Plaintiffs-Appellees); and

Housing and Community Development Corporation of Hawaii (HCDCH); Robert J. Hall, in his capacity as Acting Executive Director of HCDCH; Charles Sted, Chair, Stephanie Aveiro, Francis L. Jung, Charles King, Lillian B. Koller, Betty Lou Larson, Theodore E. Liu, Travis Thompson, Taiaopo, Tuimaleialiifano, Members of the Board of Directors of HCDCH; State of Hawai'i; and Linda Lingle, in her capacity as Governor of the State of Hawaii (Defendants-Appellants).

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IN THE

Supreme Court of the United States

No. 07-____

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

PETITION FOR A WRIT OF CERTIORARI

The State of Hawaii petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Hawaii.

OPINION BELOW

The decision of the Supreme Court of Hawaii (App. 1a-100a) is published at 117 Haw. 174, 177 P.3d 884 (2008).

JURISDICTION

The Hawaii Supreme Court issued its decision on January 31, 2008. The judgment was entered on March 24, 2008. App. 101a. This Court has jurisdiction under 28 U.S.C. § 1257, which authorizes it to review "[f]inal judgments or decrees rendered by the highest court of

a State ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States."

STATUTORY PROVISIONS INVOLVED

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (the "Apology Resolution") is reprinted at App. 103a-111a.

The Admission Act of March 18, 1959, Pub. L. No. 86-3, is reprinted at App. 113a-132a.

STATEMENT

In 1993, Congress marked the 100th anniversary of the overthrow of the Hawaiian monarchy by enacting a joint resolution—the Apology Resolution—that expresses the federal government's regret for its role in that incident. In this case, the Supreme Court of Hawaii held that this symbolic Resolution tacitly, but materially, impairs the State's sovereign authority over its own lands. Specifically, the court held that the Resolution should be read to prohibit the State from selling, exchanging, or transferring approximately 1.2 million acres of State land—almost all of the land owned by the State and about 29 percent of the total land area of the State—until it has struck a political settlement with native Hawaiians who assert aboriginal rights to that land.

Nothing in the Apology Resolution remotely supports that outcome; indeed, the Resolution does not even purport to address Hawaii's sovereign powers in general or its authority over state lands in particular.

By construing this federal apology to impair Hawaii's sovereign prerogatives, the Hawaii Supreme Court badly misconstrued congressional intent and raised grave federalism concerns. Moreover, by concocting a basis for its decision under *federal law*, the court wholly insulated its highly controversial decision from correction by the state political process. Only this Court can free the State from that misuse of federal law.

1. In 1893, with the involvement of certain United States officials, the Hawaiian monarchy was overthrown. *See generally Rice* v. *Cayetano*, 528 U.S. 495, 499-506 (2000). The United States annexed Hawaii in 1898, and the interim Hawaiian government ceded 1.8 million acres of former crown, public, and government lands to the federal government. App. 4a. Hawaii became a United States territory in 1900, and it joined the Union in 1959 as the fiftieth state. *Rice*, 528 U.S. at 505.

Under the terms of the statute admitting Hawaii as a state, the federal government granted title to Hawaii to most of the previously ceded lands (keeping some 350,000 acres) and mandated that these ceded lands be held by Hawaii in public trust. App. 113a. Section 5 of the Admission Act provides that these lands, which now total 1.2 million acres,[1] "together with the pro-

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[1] The land area of the State of Hawaii totals about 6,422.6 square miles, *see* Hawaii State Databook, http://hawaii.gov/dbedt/info/economic/databook/db2006/section05.pdf, at tables 5.07 and 5.08, which equals about 4,110,464 acres. Thus, the approximately 1.2 million acres of ceded land at issue here constitutes about 29 percent of the total land area of the State and nearly all of the approximately 1.3 million total acres of land owned by the State. *See* http://hawaii.gov/dbedt/gis/maps/state_lands_non-dhhl_statewide

ceeds from the *sale or other disposition* of [these] lands and the income therefrom," must be used by the State for one or more of five purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

App. 116a-117a (emphasis added). Section 5(b) of the Admission Act provides that this grant of title to Hawaii was made "in lieu of any and all grants provided for new States by provisions of law other than [the Admission Act], and such grants shall not extend to the State of Hawaii." App. 115a.

Hawaii state law authorizes the fee simple sale of land owned by the State. *E.g.*, Haw. Rev. Stat. §§ 171-13, 171-41, & 171-42. Hawaii law further provides that "[a]ll funds derived from the sale . . . or other disposition" of the ceded lands transferred by the United States to the State "or acquired in exchange for lands so ceded" shall "be held as a public trust" for the purposes specified in the Admission Act. Haw. Rev. Stat. § 171-18 (originally adopted in 1962 Haw. Sess. L. Act 32).

.pdf (excluding 200,000 acres held by the State pursuant to the Hawaiian Homes Commission Act of 1920 and the Admission Act, *see Rice*, 528 U.S. at 507-509).

In 1978, a state constitutional convention established the Office of Hawaiian Affairs ("OHA") to receive and manage a portion of the income from the ceded lands for the benefit of native Hawaiians (the second of the permitted five purposes). *See* Haw. Const. art. XII, §§ 4-6; Haw. Rev. Stat. ch. 10. Under state law at the time, OHA received 20 percent of all "funds" derived from the ceded lands. 1980 Haw. Sess. L. Act 273, at 525, *abrogated by* 1990 Haw. Sess. L. Act 304, § 3, at 948, Haw. Rev. Stat. § 10-2 (substituting the word "revenue" for "funds"); *see also Office of Hawaiian Affairs* v. *State*, 96 Haw. 388, 31 P.3d 901 (2001).

2. In 1993, Congress enacted the Apology Resolution and summarized its purpose as follows:

> [I]t is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians[.]

App. 109a.

The Resolution sets forth a list of historical findings, followed by three sections of operative text. Section 1, titled "Acknowledgment and Apology," recites that Congress:

> (1) . . . acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

> (2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;
>
> (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;
>
> (4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and
>
> (5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

App. 109a-110a.

Section 2 of the Apology Resolution defines the term "Native Hawaiian" to include "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." App. 110a. Section 3 then states:

> Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

App. 111a. Nothing in the Apology Resolution explicitly or implicitly impairs Hawaii's sovereign right to control or alienate any of the lands it owns.

3. This case began in 1994, shortly after President Clinton signed the Apology Resolution into law. The dispute began over a 500-acre parcel of land in West Maui referred to as the "Leiali'i parcel." Since 1987, the State's affordable housing authority, the Housing Finance and Development Corporation (HFDC),[2] had been working to procure the Leiali'i parcel. HFDC sought to turn this land into a residential development because it was located in an area with a "critical shortage" of affordable housing. App. 18a. Home ownership is one of the five explicit purposes for which ceded land (or proceeds from the sale of such land) may be used pursuant to Section 5 of the Admission Act. *See* p. 4, *supra*.

In 1989, HFDC filed a petition with the Land Use Commission to reclassify the parcel from agricultural to urban use. App. 20a. The Commission granted the petition, with respondent OHA's approval, in 1990. *Id.* For the next four years, OHA and HFDC tried to agree on the compensation due to OHA when the State transferred the land to HFDC. App. 20a-21a. In 1992, the Hawaii legislature established that OHA would receive 20 percent of the fair market value of the land to be

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[2] In 1997, the Hawaii legislature merged HFDC into the Housing and Community Development Corporation of Hawaii (HCDCH), which is the captioned party in this case. 1997 Haw. Sess. L. Act 350, § 1, at 1010-11, Haw. Rev. Stat. ch. 201G (2001). HFDC was spun off as a separate agency again in 2006. *See* 2006 Haw. Sess. L. Act 180, § 2, at 709; 2007 Haw. Sess. L. Act 249, § 2, at 777-806 (codified at Haw. Rev. Stat. ch. 201H, 356D).

transferred. 1992 Haw. Sess. L. Act 318, at 1016. The parties, however, disputed the parcel's fair market value. While this negotiation continued, HFDC spent $31 million developing the parcel, including building roads, hooking up utilities, and grading the lots. App. 22a.

After the Apology Resolution was enacted in 1993, OHA demanded, for the first time, that HFDC attach a disclaimer to the Leiali'i transfer stating that the conveyance would not waive or diminish native Hawaiian claims to ownership of the land. App. 21a. HFDC rejected this proposed disclaimer because it obviously would have clouded the title to the land and thus would have undermined the interests of would-be homeowners. *Id.* On November 4, 1994, HFDC purchased the land from the State for consideration of $1.00 and transmitted a check to OHA for $5,573,604.40, 20 percent of the fair market value OHA had previously said it would consider accepting. *Id.* OHA refused the check.

4. Respondent OHA filed this suit on November 4, 1994, and the individual plaintiffs (also respondents here) filed a separate suit on July 14, 1995. The cases were consolidated shortly thereafter. Arguing that the Apology Resolution had "changed the legal landscape and had restructured the rights and obligations of the State," App. 27a, respondents requested (1) an injunction prohibiting the State from selling any ceded lands and (2) an injunction barring the sale of the Leiali'i parcel specifically. In the alternative, they requested a declaration that any sale of the lands would violate the state constitution and the federal Admission Act, or would not release or limit the claims of native Hawaiians.

After a bench trial in November and December 2001, the trial court ruled for the State on the grounds of waiver, collateral estoppel, sovereign immunity, ripeness, and the political question doctrine. App. 26a-27a. It also held that the State had the authority to transfer the ceded lands. *Id.* On February 3, 2003, the trial court certified its judgment as final pursuant to Hawaii Rule of Civil Procedure 54(b). Respondents appealed.

5. On January 31, 2008, nearly twenty years after HFDC first filed its petition to reclassify the Leiali'i parcel, the Hawaii Supreme Court issued its decision. The primary question on appeal was "whether, in light of the Apology Resolution, [the] court should issue an injunction to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved." App. 79a. The court answered that question in the affirmative.

The court first construed the text of the Apology Resolution to recognize the "unrelinquished claims" that native Hawaiians have asserted in the lands at issue. App. 32a. From this, the court inferred that the Apology Resolution subjects the State to a new and specific fiduciary duty to preserve the lands until some undefined future date. The court found support for this interpretation in Congress's statement that it intended "to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.* (quoting 107 Stat. at 1513) (emphasis omitted). On these grounds, the court enjoined the State from transferring any of the ceded lands, including the Leiali'i parcel, "pending a reconciliation between the United States and the native Hawaiian people" and "until the claims of the native Hawaiians to the ceded lands have been resolved." App. 85a, 100a. It did not

set out a standard for determining what type or extent of "reconciliation" would be sufficient to warrant lifting the injunction. It held only that "injunctive relief is proper pending final resolution of native Hawaiian claims through the political process." Pet. App. 98a.

The Hawaii Supreme Court repeatedly stressed that its decision rested primarily on its construction of the federal Apology Resolution. *See* App. 26a ("At the heart of the plaintiffs' claims . . . is the Apology Resolution."); App. 79a ("The primary question . . . is whether, in light of the Apology Resolution, this court should issue an injunction.") (emphasis omitted); App. 85a ("[T]he language of the Apology Resolution itself supports the issuance of an injunction."); App. 85a ("[T]he Apology Resolution dictates that the ceded lands should be preserved."). Indeed, the court held that "it was not until at least November 23, 1993, when the Apology Resolution was signed into law by President Clinton, that the plaintiffs [respondents here] had knowledge, actual or constructive, of the existence of" a cause of action. App. 58a-59a (citation and internal punctuation omitted). The court invoked state-law provisions as well, but only as ancillary support for its judgment. *See* App. 35a-39a.[3] This Court has jurisdiction over this case because, at a minimum, this "state court decision fairly appears to rest primarily on fed-

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[3] It referred principally to 1993 legislation stating that the overthrow of the monarchy was illegal, 1993 Haw. Sess. L. Act 354, § 1, at 999-1000, and to 1997 legislation recognizing legislative intent "to continue [the] momentum" toward permanent reconciliation," 1997 Haw. Sess. L. Act 329, § 1, at 956. Neither of these provisions bars the sale of ceded lands, and neither amends or abrogates the substantive Hawaii law that specifically *allows* the State to sell the ceded lands it owns. *See* p. 4, *supra*.

eral law, or to be interwoven with the federal law, and ... the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983).

REASONS FOR GRANTING THE PETITION

The decision below holds that Congress dramatically but silently abrogated key land rights—essential to the sovereignty of any State—that Hawaii explicitly received when it was admitted to the Union in 1959. That perplexing decision is as important as it is wrong and warrants this Court's review.

First, the practical impact of this decision is enormous: it bars the State from prudently managing, for the benefit of all citizens of Hawaii, more than 1.2 million acres of State-owned land—29 per cent of the total land area of the State and almost all the land owned by the State. *See, e.g., Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) (granting certiorari to decide statutory interpretation question affecting property rights to millions of acres of Western land). Second, by construing this congressional enactment as an impairment of the State's sovereign authority over its land, the decision raises serious federalism concerns. *See, e.g., Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 65 (1974) (granting certiorari where the case presented "important questions touching the accommodation of state and federal interests under the Constitution"). Third, by basing its decision primarily on federal law, the Hawaii Supreme Court improperly insulated its decision from any state-level political check. Only this Court can correct that problem by enforcing a proper interpretation of federal law.

I. THE HAWAII SUPREME COURT'S DECISION ERRONEOUSLY REWRITES A FEDERAL ENACTMENT TO BAR THE STATE FROM CONVEYING TITLE TO MORE THAN 1.2 MILLION ACRES OF STATE-OWNED LAND

A. The Hawaii Supreme Court's Interpretation Of The Apology Resolution Conflicts With The Resolution's Express Terms

The Apology Resolution acknowledges the mistreatment native Hawaiians suffered as a result of the 1893 overthrow and recognizes a federal commitment to reconciliation. But the Resolution does not mandate, justify, or even contemplate the imposition of new limits on Hawaii's sovereign authority to sell, exchange, or transfer its lands for any of the purposes identified in the Admission Act. The Hawaii Supreme Court thus had no coherent basis for invoking this federal provision to abrogate the State's core sovereign authority over its own lands.

Interpretation of the Apology Resolution begins with its text. *See, e.g., Nebraska Dep't of Revenue* v. *Loewenstein*, 513 U.S. 123, 128 (1994); *Ann Arbor R.R. Co.* v. *United States*, 281 U.S. 658, 666 (1930) (interpreting a joint resolution under the standard rules of statutory construction). After a succession of "whereas" clauses, which recite the relevant history, the Resolution contains seven operative paragraphs. The first five, which comprise Section 1, list the elements of Congress's "acknowledgment and apology" to "Native Hawaiians." Then, in one paragraph apiece, Section 2 defines "Native Hawaiians," and Section 3 provides a savings clause for "settlement of claims" against the United States.

All told, the Resolution serves two purposes: "To *acknowledge* the 100th anniversary of the January 17,

1893 overthrow of the Kingdom of Hawaii, and *to offer an apology* to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." App. 103a (emphasis added). The Resolution does not address the State's trust obligations, let alone restrict the State's preexisting and explicit authority to transfer land out of the trust—and to dispose of "the proceeds from the sale" of such land—in accordance with any of the five purposes set forth in the Admission Act. App. 116a. Indeed, nothing in the Resolution alters *any* of the State's legal rights or obligations in any respect.

The Section 3 disclaimer does not somehow draw that conclusion into question, as the Hawaii Supreme Court appeared to believe; instead, the disclaimer *confirms* that conclusion. In its entirety, Section 3 states: "Nothing in [the Resolution] is intended to serve as a settlement of any claims against the United States." At most, this savings clause ensures that claimants against the United States will be no *worse off* after the Resolution is enacted than they were before. The Hawaii Supreme Court, however, held that this savings clause unequivocally *requires* "the future settlement of the plaintiffs' unrelinquished claims" to the land. App. 34a. But the savings clause says no such thing: it simply preserves the status quo. If Congress had intended to alter substantive rights, it would have done so explicitly in the text of Resolution—as it has done in other "apology" enactments. *See, e.g.*, Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989) (acknowledging and apologizing "for the evacuation, relocation and internment" of Japanese citizens during World War II and providing restitution to interned Japanese-Americans and Alaskan Aleuts).

Finally, if there were any doubt that the Apology Resolution leaves substantive rights unaltered, that doubt would be dispelled by the Resolution's legislative history and subsequent judicial interpretation. For example, the Senate Report accompanying the Resolution states emphatically that this enactment "will not result in any changes in existing law." *See* S. Rep. No. 103-126, at 35 (1993); *see also* 139 Cong. Rec. S14477, S14482 (daily ed. Oct. 27, 1993) (remarks of Sen. Inouye) ("[T]his is a simple resolution of apology, to recognize the facts as they were 100 years ago."); 139 Cong. Rec. H9627, H9630 (daily ed. Nov. 15, 1993) (statement of Rep. Abercrombie) (similar). And, until the Hawaii Supreme Court's decision here, every court that had addressed that question had agreed with that basic proposition. *See Rice* v. *Cayetano*, 941 F. Supp. 1529, 1546 n.24 (D. Haw. 1996) ("[The Apology Resolution] did not create any substantive rights . . . . The Apology Bill creates no specific Native Hawaiian rights."), *rev'd on other grounds*, 528 U.S. 495 (2000); *Office of Hawaiian Affairs* v. *Housing Fin. & Dev. Corp.*, Trial Ct. Decision, App. 175a ("[B]y its terms, the 1993 Apology Resolution does not . . . itself create a claim, right or cause of action."); *see also Rice* v. *Cayetano*, 528 U.S. 495, 505 (2000) (referring to the Resolution as only an acknowledgment and apology); *Doe* v. *Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc) (same).

In short, by construing this Resolution to undercut substantive rights and curtail the State's sovereign authority over its lands, the Hawaii Supreme Court violated every court's duty when construing federal law to "presume that a legislature says in a statute what it means and means in a statute what it says there."

Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249, 253-254 (1992).

B. The Doctrine Of Constitutional Avoidance Requires Reversal

It is a "cardinal principle" of statutory interpretation that, when Congress's intent is ambiguous, courts should construe statutes to avoid interpretations that would raise "grave and doubtful constitutional questions." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, even if Congress's intent were ambiguous, the Apology Resolution should be construed to leave the State's sovereign authority over its lands intact, because otherwise—under the Hawaii Supreme Court's interpretation—the Resolution would raise grave federalism concerns.

The Hawaii court triggered these concerns by interpreting the Apology Resolution to abrogate the State's sovereign power—explicitly granted by Congress "in lieu of any and all grants provided for new States" (*see* p. 4, *supra*)—to manage and sell or exchange its own public lands within the broad limits set forth in the Admission Act. *See Coyle* v. *Smith*, 221 U.S. 559, 578 (1911) (striking down federal legislation dictating location of state capital as violation of state's "jurisdictional sovereignty"); *see also Isaak* v. *Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999). ("Property is not merely the ownership and possession of land .... It also embraces the unrestricted right to use, enjoy and dispose of lands .... Anything [that] destroys any of these elements of property, to that extent destroys the property itself."). The Constitution preserves the states' "substantial" sovereign powers, "powers with which Congress does not readily inter-

fere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). No federal law should be construed to pre-empt these sovereign powers unless, at a minimum, Congress makes that purpose "clear and manifest." *Gregory*, 501 U.S. at 461 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Though the Apology Resolution contains no such clear statement, the Hawaii Supreme Court found that Congress intended not just to regulate, but to eliminate, the State's preexisting and explicit right to transfer, exchange, or sell these lands for the benefit of all the people of Hawaii in accord with the purposes set forth in the Admission Act. The court thereby abandoned its obligation to "assume that Congress does not exercise lightly" its limited powers to legislate in areas traditionally reserved to the States. *Gregory*, 501 U.S. at 460. This Court should grant review to free Hawaii from this groundless but very substantial impairment of its sovereign authority.

II. This Court's Review Is Necessary To Restore Appropriate Authority To Hawaii's Political Branches

If the Hawaii Supreme Court had based its highly controversial decision solely on state law rather than primarily on federal law, the State's political branches could have revisited the merits of that decision and potentially overruled it. By basing its decision on federal law, however, the Hawaii Supreme Court effectively insulated its decision from any political check at the state level, because the court's interpretation of the federal Apology Resolution would trump any new state legislation to restore the State's land-transfer authority. Only this Court can correct that misuse of federal law to hamstring the State's political process.

It is also entirely unclear when the Hawaii Supreme Court will conclude that its current injunction will be lifted. The court has indicated that the injunction will remain until there has been a "final resolution" of native Hawaiian claims. App. 97a-98a. But it has not articulated what would constitute a "final resolution" of these claims, how far that resolution should reach substantively, and how the legislature will know when it has satisfied the court's demands. The court alone has retained for itself the power to determine when reconciliation is complete.

Absent review by this Court, this injunction will continue to hold the State hostage to the Hawaii Supreme Court's deeply flawed analysis of federal law. The error and the injury in this case are unmistakable, and only this Court has the power to correct them. It should exercise that power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2008

APPENDIX

APPENDIX A

SUPREME COURT OF HAWAI'I

No. 25570

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,
Plaintiffs-Appellants,

v.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, ET AL.,
Defendants-Appellees.

Jan. 31, 2008

MOON, C.J., LEVINSON, NAKAYAMA, and ACOBA, JJ.; and Circuit Judge CHAN, in Place of DUFFY, J., Recused.

Opinion of the Court by MOON, C.J.

Two sets of plaintiffs-appellants-(1) the Office of Hawaiian Affairs (OHA) and its Board of Trustees [hereinafter, collectively, the OHA plaintiffs] and (2) Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'a'ai'ai, and Keoki Maka Kamaka Ki'ili [hereinafter, collectively, the individual plaintiffs and, together with the OHA plaintiffs, collectively, the plaintiffs] appeal from the Circuit Court of the First Circuit's January 31, 2003 final judgment,[1] entered pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule

[1] The Honorable Sabrina S. McKenna presiding.

54(b) (2007).[2] Following a jury-waived trial, the trial court found in favor of defendants-appellees State of Hawai'i (State), the Housing and Community Development Corporation of Hawai'i, and the executive director and members of the board of directors of the HCDCH,[3] as well as Linda Lingle, in her capacity as Governor of the State [hereinafter, collectively, the defendants] and against the plaintiffs.

Briefly stated, the instant action arises from the defendants' efforts in the mid-1990s to transfer certain parcels of ceded lands to private entrepreneurs for the purpose of residential development. On August 11, 1995, the plaintiffs filed suit, seeking an injunction against the defendants from selling or otherwise transferring to third parties two specific parcels of ceded lands located on the islands of Maui and Hawai'i,[4] as

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[2] Rule 54(b) provides in relevant part that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[3] Donald K.W. Lau is the executive director of HCDCH, and the board of directors includes chairperson, Wesley R. Segawa, and members Nadine K. Nakamura, Kurt H. Mitchell, Don Fujimoto, Allan Los Banos, Jr., Susan Chandler, Craig Hirai, Ronald S. Lim, and Bradley J. Mossman.

[4] The plaintiffs filed suit before the parcel on the island of Hawai'i (the Big Island) was transferred. It appears that, at some point, the Big Island parcel [hereinafter, also referred to as the La'i'opua parcel] was transferred to the Department of Hawaiian Homelands (DHHL), which transfer is not specifically challenged

well as any ceded lands from the public lands trust. Alternatively, the plaintiffs sought a declaration that the State was not authorized to alienate ceded lands from the public lands trust or, if the trial court ruled the State was so authorized, a declaration that (2) such alienation would not limit the claims of native Hawaiians to the ceded lands.

On December 5, 2002, the trial court ruled in favor of the defendants, concluding that the plaintiffs' claims were barred by the doctrines of: (1) sovereign immunity; (2) waiver and estoppel; and (3) justiciability-specifically, political question, ripeness, and the mandate against advisory opinions. Nevertheless, the trial court also concluded that the State had the express authority to alienate ceded lands from the public lands trust. An HRCP Rule 54(b) judgment was, thereafter, entered on January 31, 2003, and the plaintiffs appealed.

On appeal, both sets of plaintiffs challenge the aforementioned determinations made by the trial court. Additionally, the OHA plaintiffs assert that the trial court erred in making several evidentiary rulings.

For the reasons discussed *infra*, we vacate the January 31, 2003 judgment and remand this case to the circuit court with instructions to issue an order granting the plaintiffs' request for an injunction against the defendants from selling or otherwise transferring to third parties (1) the parcel of ceded land on Maui and (2) any ceded lands from the public lands trust until the

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by the plaintiffs. Accordingly, other than a few references to the La'i'opua parcel in this opinion, the disposition of the Big Island parcel is not specifically addressed. *See also infra* note 11.

claims of the native Hawaiians to the ceded lands has been resolved.

I. *BACKGROUND*

A. *Historical Background*

The issues presented in this case have their genesis in the historical events that led to the overthrow of the Kingdom of Hawai'i, the surrender of 1.8 million acres of crown, government, and public lands to the United States, the admission of Hawai'i as a state of the Union, and the creation of OHA and the public lands trust. *See Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 340-42, 133 P.3d 767, 769-71 (2006) [hereinafter, *OHA II*]; *Office of Hawaiian Affairs v. State*, 96 Hawai'i 388, 389-92, 31 P.3d 901, 902-05 (2001) [hereinafter, *OHA I*]; *Pele Defense Fund v. Paty*, 73 Haw. 578, 585-87, 837 P.2d 1247, 1254-55 (1992); and *Trs. of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 159-65, 737 P.2d 446, 449-53 (1987), *cert. denied*, 484 U.S. 898, 108 S. Ct. 234, 98 L. Ed. 2d 192 (1987); *see also Rice v. Cayetano*, 528 U.S. 495, 501, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

> As a condition of its admission into the Union, the State of Hawai'i agreed to *hold certain lands granted to the State by the United States in a public land trust for five purposes*[.] *See* Admission Act of March 18, 1959, Pub.L. No. 86-3, § 5, 73 Stat. 4, *reprinted in*, [Hawai'i Revised Statutes (HRS), vol. 1 at § 5 of the Admissions Act].

OHA I, 96 Hawai'i at 390, 31 P.3d at 903 (emphasis added). The aforementioned five purposes are specifically delineated in section 5(f) of the Admission Act, which provides in relevant part:

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust *[(1)] for the support of the public schools and [(2)] other public educational institutions, [(3)] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*[5] *[(4)] for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and [(5)] for the provision of lands for public use.* Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

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[5] The Hawaiian Homes Commission Act was enacted by the United States Congress (Congress) to set aside over 200,000 acres of ceded lands for exclusive homesteading by native Hawaiians. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). As a condition of statehood, the United States required the State to adopt the act as a provision of the state constitution, *see* Hawai'i Const. art. XI, § 2 (1959) (renumbered art. XII, § 2 (1978)); *see also Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982) (detailing the purpose of the Hawaiian Homes Commission Act and the creation of the Commission).

> Although the Hawaiian Homes Commission Act defines the term "native Hawaiian" as "any descendant of *not less than one-half part* of the blood of the races inhabiting the Hawaiian Islands previous to 1778," HRS, vol. 1 at § 201(7) of the Hawaiian Homes Commission Act, for the purposes of this opinion, we use the term to mean "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Pub. L. No. 103-150, 107 Stat. 1510 (1993).

(Emphasis added.) The management and administration of the ceded lands subject to the section 5(f) trust, *i.e.*, the public lands trust, is vested in the Department of Land and Natural Resources (DLNR), pursuant to HRS § 171-3 (Supp.2006). *See also Pele Defense Fund*, 73 Haw. at 586-87, 837 P.2d at 1254. * * *

> In 1978, the people of Hawai'i clarified the State's trust obligation to native Hawaiians during a Constitutional Convention, as set forth in various provisions of the Hawai'i Constitution, including article XII, sections 4 through 6, ... wherein OHA was created and charged with managing proceeds derived from the ceded lands and designated for the benefit of native Hawaiians. Additionally, article XVI, section 7 of the Hawai'i Constitution requires the State to enact legislation regarding its trust obligations. Thus, in 1979, legislation was enacted that set forth the purposes of OHA and described the powers and duties of the trustees.... 1979 Haw. Sess. L. Act 196, § 2 at 398-99, § 8 at 406 (codified at HRS chapter 10)[.] In 1980, the legislature amended HRS chapter 10

> by adding HRS § 10-13.5, which provided that "twenty per cent of all *funds* derived from the public land trust shall be expended by OHA for the purposes of this chapter." ...1980 Haw. Sess. L. Act 273, § 1 at 525.[6]

OHA II, 110 Hawai'i at 340-41, 133 P.3d at 769-70 (citations, original brackets, and ellipsis omitted) (emphasis in original).[7]

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[6] Although not pertinent to the instant appeal, we concluded, in *Yamasaki*, that the construction of the term "funds," as used in HRS § 10-13.5, "provide[d] no judicially discoverable and manageable standards for resolving the disputes[, *i.e.*, whether OHA was entitled to (1) a portion of damages received by the State for illegal mining of sand from public land and (2) a pro rata share of income and proceeds from sales, leases, or other dispositions of certain public lands,] and [that the disputes] cannot be decided without initial policy determinations of a kind clearly for nonjudicial discretion." 69 Haw. at 173, 737 P.2d at 457 (citation, internal quotation marks, and original brackets omitted). Consequently, the legislature enacted Act 304, amending HRS § 10-13.5 by essentially substituting "incomes" for "funds" and defining the term "revenue." 1990 Haw. Sess. L. Act 304, §§ 3, 7 at 948, 951; HRS §§ 10-13.5 (1993), 10-2 (1993). However, in *OHA I*, we invalidated and effectively repealed Act 304 as conflicting with federal law. 96 Hawai'i at 399, 31 P.3d at 912.

[7] We observe that the trial court found that, "[i]n recent years, there have been discussions and movement toward the creation of a sovereign Hawaiian government, and this movement has received both state and federal recognition." Some scholars dispute that this movement has been of recent inception, stating instead that, "[e]ver since the illegal overthrow and annexation, the native people of Hawai'i-identified as 'Kanaka Maoli,' 'Native Hawaiians' or 'Hawaiians'—have struggled to regain their culture, recover their lands and restore their sovereign nation." Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of Native Hawaiian People*, 10-JUL Haw. B.J. 63, 63 (2006) (footnote omitted). The trial court further found that "various Hawai-

Moreover, in 1993, the year that marked the one-hundredth anniversary of the overthrow of the Kingdom of Hawai'i, both houses of Congress passed the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii [hereinafter, the Apology Resolution], which was signed into law by then-President Bill Clinton on November 23, 1993 as Public Law No. 103-150, 107

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ian groups support [ ] different forms of sovereignty." However, as observed by one scholar, "[u]ltimately, [n]ative Hawaiians seek return of [the ceded lands] from both the state and federal governments. How such lands would be cared for and managed, who would have jurisdiction over them, and what rights [n]ative Hawaiians could exercise upon them are crucial aspects of [n]ative Hawaiian self-governance and sovereignty." *Native Hawaiian Rights Handbook*, 40 (Melody Kapilialoha MacKenzie, ed., 1991). Additionally, we note that the trial court found that the federal legislation commonly referred to as the "Akaka Bill" was passed out of the Senate Committee on Indian Affairs on September 21, 2001.... The Committee Report on the Akaka Bill explains that its purpose "is to authorize a process for the reorganization of a[n]ative Hawaiian government and to provide for the recognition of the [n]ative Hawaiian government by the United States for the purpose of carrying on a government-to-government relationship." The Akaka Bill, if enacted[,] ... provides that the federal government is authorized to negotiate with the State and the reorganized [n]ative Hawaiian government for a transfer of land and resources to a [n]ative Hawaiian government. The [n]ative Hawaiian government created by [the Akaka Bill] would thus have a land base and resources and a status similar to that over other native peoples in the United States. The Committee Report to [the Akaka Bill] explains that "it is the Committee's intent that the references to 'land, resources, and assets dedicated to [n]ative Hawaiian use' include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands." The legislation is still pending before the United States Congress. (Footnotes omitted.) We take judicial notice that the current version of the Akaka Bill was passed by the House of Representatives on October 24, 2007.

Stat. 1510 (1993). The Apology Resolution provides, in its entirety, as follows:

> Joint Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to [n]ative Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.
>
> Whereas, prior to the arrival of the first Europeans in 1778, the [n]ative Hawaiian people lived in a highly organized self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;
>
> Whereas[,] a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;
>
> Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;
>
> Whereas[,] the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Missions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850;
>
> Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the

"United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;

Whereas, in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;

Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendents of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;

Whereas[,] the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the [n]ative Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;

Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement

yielding her authority to the United States Government rather than to the Provisional Government:

> I[,] Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.
>
> Done at Honolulu this 17th day of January, A.D. 1893.;

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani

would have failed for lack of popular support and insufficient arms;

Whereas[,] on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

Whereas, the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government;

Whereas, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission;

Whereas, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;

Whereas[,] President Cleveland further concluded that a "substantial wrong has thus been done which a due regard for our national char-

acter as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy;

Whereas[,] the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States;

Whereas[,] the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred to in this Resolution as the "Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy;

Whereas[,] the Committee and its chairman, Senator John Morgan, conducted hearings in Washington, D.C., from December 27, 1893, through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii;

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation;

Whereas, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was

forced by representatives of the Republic of Hawaii to officially abdicate her throne;

Whereas, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland;

Whereas, on July 7, 1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

Whereas, the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the [n]ative Hawaiian people of Hawaii or their sovereign government;[8]

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[8] As this court stated in *OHA I*:

> In addition to its sovereignty, the Republic "ceded and transferred to the United States the absolute fee and ownership of all public, Government, or Crown lands belonging to the Government of the Hawaiian Islands together with every right and appurtenance thereunto appertaining." *Yamasaki*, 69 Haw. at 159, 737 P.2d at 449. Following annexation and until 1959, Hawaii's seat of power was vested in a Territorial Government. *See* Organic Act § 3, Act of April 30, 1990, c. 339, 31 Stat. 141, *reprinted in* [HRS, vol. 1 at §§] 43, 44 [of the Organic Act] (establishing the government of the Territory of Hawai'i).

96 Hawai'i at 389-90, 31 P.3d at 902-03.

Whereas[,] the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;

Whereas[,] the Newlands Resolution also specified that treaties existing between Hawaii and foreign nations were to immediately cease and be replaced by United States treaties with such nations;

Whereas[,] the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government;

Whereas[,] the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

Whereas, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship with the United States;

Whereas, on August 21, 1959, Hawaii became the 50th State of the United States;

Whereas[,] the health and well-being of the [n]ative Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas[,] the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastat-

ing to the population and to the health and well-being of the Hawaiian people; * * *

Whereas[,] the [n]ative Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions;

Whereas, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the [n]ative Hawaiians in the Hawaiian and the American societies;

Whereas[,] the Eighteenth General Synod of the United Church of Christ in recognition of the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the [n]ative Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the [n]ative Hawaiians; and

Whereas[,] it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express deep regret to the [n]ative Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church

of Christ with [n]ative Hawaiians: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United State of American in Congress assembled,

SECTION 1. ACKNOWLEDGEMENT AND APOLOGY.

The Congress—

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the [n]ative Hawaiian people;

(2) recognizes and commends the efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with [n]ative Hawaiians;

(3) apologizes to [n]ative Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of [n]ative Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the [n]ative Hawaiian people; and

> (5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the [n]ative Hawaiian people.
>
> SEC[TION] 2. DEFINITIONS.
>
> As used in this Joint Resolution, the term "[n]ative Hawaiian" means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
>
> SEC[TION] 3. DISCLAIMER.
>
> Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.
>
> Approved November 23, 1993.
>
> Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphases added) (internal quotation marks omitted).

B. *Factual Background*

In 1987, the legislature, in an effort to remedy the problem of the "critical shortage of safe and sanitary housing units which are affordable to lower income residents of the State[,]" established the Housing Finance and Development Corporation (HFDC)[9] via its

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[9] In 1997, the legislature consolidated HFDC with the Hawai'i Housing Authority and the rental housing trust fund into the Housing and Community Development Corporation of Hawaii (HCDCH). 1997 Haw. Sess. L. Act 350, § 1 at 1010-11; HRS chap-

enactment of HRS chapter 201E. 1987 Haw. Sess. L. Act 337, § 15 at 1045; HRS §§ 201E-1 and -3 (1993). HFDC was authorized to, *inter alia*, develop

> fee simple or leasehold property, construct dwelling units thereon, including condominiums, planned units, and cluster developments, and sell, lease, or rent or cause to be leased or rented, at the lowest possible price to qualified residents, nonprofit organizations, or government agencies, with an eligible developer or in its own behalf, either:
>
> (1) Fully completed dwelling units with the appropriate interest in the land on which the dwelling unit is located; or
>
> (2) Units which are substantially complete and habitable with the appropriate interest in the land on which the dwelling unit is located; or
>
> (3) The land with site improvements (other than the dwelling unit) either partially or fully developed.

HRS § 201E-201(a) (1993). Consequently, that same year, 1987, the HFDC began to examine areas in the State that had a "critical shortage

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ter 201G (2001). However, the legislature, in 2006, divided HCDCH into two separate agencies-the Hawai'i Housing Finance and Development Corporation and the Hawai'i Public Housing Authority. *See* 2006 Haw. Sess. L. Act 180, § 2 at 709; 2007 Haw. Sess. L. Act 249, § 2 at 777-806 (codified in HRS chapters 201H and 356D). Nevertheless, inasmuch as the instant action commenced prior to the aforementioned legislative changes, we continue to utilize "HFDC," as do the parties, throughout this opinion.

of housing" and selected two potential sites-(1) Leiali'i in West Maui and (2) La'i'opua in North Kona,[10] both of which were comprised of ceded lands[11]—for the development of housing projects.

After conducting feasibility studies of the potential sites, the HFDC filed a petition with the Land Use Commission (LUC) in December 1989, seeking to reclassify the Leiali'i parcel from agricultural to urban use. At a public hearing on April 10, 1990, OHA, through its Land and Natural Resources Officer, gave oral testimony recommending conditional approval of the petition. On May 18, 1990, the LUC granted the petition, reclassifying the property for urban use. Thereafter, HFDC began a residential housing development project for the parcel. As the "Master Developer" for the Leiali'i project, HFDC was responsible for providing the major infrastructure, *i.e.*, roadways, lighting poles, and sewer hook-ups, needed for the residential development. HFDC contracted with a private developer to build the houses.

In 1992, the legislature enacted Act 318 (codified as HRS § 10-13.6 (1993)) that set forth a formula to compensate OHA for the "villages of Leiali'i, Maui and villages of La'i'opua, Hawai'i" that were to be conveyed from DLNR to HFDC. HRS § 10-13.6(e) (Supp. 2007);

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[10] As stated *supra* note 5, other than a few references to the La'i'opua parcel in this opinion, the transfer of said parcel is not specifically challenged by the plaintiffs. Moreover, the parties' briefs and arguments focus primarily on the Leiali'i parcel and the ceded lands in general.

[11] The Leiali'i parcel was part of the former crown lands subject to subsection 5(b) of the Admission Act.

see also 1992 Haw. Sess. L. Act 318, § 10 at 1016-17. According to Act 318's formula, OHA was to be compensated twenty per cent of the fair market value of the subject lands. HRS § 10-13.6(a). As a result, OHA and DLNR each retained an appraiser to determine the fair market value of the Leiali'i parcel.

In November 1993, Congress adopted the Apology Resolution, quoted fully *supra* and discussed more fully *infra*, wherein it expressly recognized, *inter alia*, that: (1) the overthrow of the Kingdom of Hawai'i was illegal; (2) the taking of crown, government, and public lands of the Kingdom was without consent or compensation; and (3) "the indigenous Hawaiian people never directly relinquished their claims ... over their national lands to the United States." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510. Congress also formally and publicly apologized to native Hawaiians on behalf of the United States for the overthrow and the deprivation of native Hawaiians' rights to self-determination. *Id.* Thereafter and as a result of the adoption of the Apology Resolution, OHA demanded, based on the advice of attorney William Meheula, that a disclaimer be included as a part of any acceptance of funds from the sale so as to preserve any native Hawaiian claims to ownership of the ceded lands, of which the Leiali'i parcel was a part.

In October 1994, HFDC declined to honor OHA's requested disclaimer because "to do so would place a cloud on [the] title, rendering title insurance unavailable to buyers in the Leali'i [sic] project." Thereafter, on November 4, 1994, "DLNR transferred about 500 acres of ceded lands" at Leiali'i to HFDC for the consideration of $1.00. HFDC transmitted to OHA a check in the amount of $5,573,604.40 as OHA's entitlement in accordance with Act 318. Based on advice from then-

OHA counsel Earl Anzai that the Apology Resolution created a cloud on the title of the ceded lands, OHA refused to accept the check. The plaintiffs thereafter filed suit in November 1994.

Subsequent to the filing of the plaintiffs' lawsuit, the HFDC made a policy decision to stop work on the project. By that time, all of the roadways, utilities, lighting poles, and sewer hookups had been completed, including some landscaping work. As of December 1994, HFDC estimated it had already invested $31 million into the Leiali'i project.

C. *Procedural History*

1. The Complaint and Pretrial Motions

On August 11, 1995, the plaintiffs filed an amended complaint (First Amended Complaint), seeking injunctive and, alternatively, declaratory relief.[12] The plaintiffs requested: (1) an injunction against all sales of ceded lands (Count I); (2) an injunction to specifically bar the sale of the Leiali'i parcel (Count II); and, alternatively, (3) a declaratory judgment that "(a) any conveyance to a third-party violates the Hawai'i State Constitution and the Admission Act, and/or (b) any sale of ceded lands does not directly or indirectly release or limit claims of [n]ative Hawaiians to those lands"

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[12] Initially, the plaintiffs filed separate complaints. On November 4, 1994, the OHA plaintiffs filed a complaint in the Circuit Court of the First Circuit. On November 9, 1994, the individual plaintiffs filed a complaint in the Circuit Court of the Second Circuit. Upon the filing of the First Amended Complaint in August 1995, the individual plaintiffs and allegations pertaining to their claims were added to those of the OHA plaintiffs in the First Circuit Court action.

(Count III).[13] The plaintiffs alleged that they would suffer irreparable harm if the defendants were allowed to transfer ceded lands to third-parties inasmuch as "alienation of the land to a third-party would erode the ceded lands trust and the entitlements of the native Hawaiian people." In other words, the plaintiffs alleged that an injunction was proper because, in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust inasmuch as such transfers would be "without regard for the claims of Hawaiians to those lands" to whom the State, as trustee, owes a fiduciary duty.

2. The Trial and the Trial Court's Written Decision

A jury-waived trial commenced on November 19, 2001. At trial, the plaintiffs adduced evidence regarding the events that surrounded the transfer of the Leiali'i parcel, the importance of the land to the native Hawaiians, analogies to Native American property rights, and the developing body of international law that favors the rights of indigenous people to traditional lands. The defendants primarily adduced evidence that the State was authorized to alienate ceded lands from the public lands trust. Additionally, the defendants argued that the plaintiffs were collaterally estopped "from even arguing that the State does not have the power to sell [the ceded lands]" based on the unpublished decision in *Trustees of the Office of Hawaiian*

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[13] In their First Amended Complaint, the plaintiffs asserted two other alternative claims that addressed valuation issues concerning the Leiali'i parcel (Counts IV and V). However, these counts were bifurcated from the case for later determination and are not at issue in this appeal. Counts IV and V are currently stayed pending this appeal.

Affairs v. Board of Land and Natural Resources, No. 19774, 87 Hawai'i 471, 959 P.2d 841 (Haw. Mar.12, 1998) (mem.) [hereinafter, *Ewa Marina*],[14] wherein this court held that the State, as ceded lands trustee, did not breach its duties by granting a dredge permit for submerged lands to a private party, discussed more fully *infra*.

On December 5, 2002, the trial court issued a 105-page written decision, entitled "Opinion of the Court" [hereinafter, the written decision]. As discussed more fully infra, the trial court ruled that, although Ewa Marina did not collaterally estop the plaintiffs from bringing their claims, such claims were barred by the doctrines of: (1) sovereign immunity; (2) waiver and estoppel; and (3) justiciability-specifically, political question, ripeness, and the mandate against advisory opinions. Notwithstanding the above rulings, the trial court also concluded that the State had the express authority to alienate ceded lands from the public lands trust.

On December 13, 2002, the plaintiffs filed a motion for HRCP Rule 54(b) certification or, in the alternative, for leave to file an interlocutory appeal, which was granted. The trial court, on January 31, 2003, filed its HRCP Rule 54(b) judgment in favor of the defendants. Both sets of plaintiffs separately filed timely notices of appeal on February 3, 2003.

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[14] As correctly cited by the trial court, Hawai'i Rules of Appellate Procedure (HRAP) Rule 35(c) (2007) prohibits citation to an unpublished memorandum opinion, "except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel[.]"

II. *STANDARDS OF REVIEW*

A. *Findings of Fact*

> The [trial court's findings of fact] are reviewed on appeal under the "clearly erroneous" standard. A [finding of fact] is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Estate of Klink ex rel. Klink v. State, 113 Hawai'i 332, 351, 152 P.3d 504, 523 (2007) (citations, internal quotation marks, original brackets, and ellipses omitted) (format altered).

B. *Conclusions of Law*

> This court reviews the [trial court's conclusions of law] de novo. A [conclusion of law] is not binding upon an appellate court and is freely reviewable for its correctness. Moreover, a [conclusion of law] that is supported by the [trial court's finding of facts] and that reflects an application of the correct rule of law will not be overturned.

Hui Kako'o Aina Ho'opulapula v. Bd. of Land & Natural Res., 112 Hawai'i 28, 38, 143 P.3d 1230, 1240 (2006) (citations, internal quotation marks, and original brackets omitted).

III. *DISCUSSION*

As previously stated, the plaintiffs seek to enjoin the defendants from selling or otherwise transferring the Leiali'i parcel to third parties and selling or otherwise transferring to third parties any of the ceded lands in general until a determination of the native Hawaiians' claims to the ceded lands is made. Alternatively, the plaintiffs seek a declaration that the State is not authorized to alienate ceded lands from the public lands trust or, if the trial court ruled that the State is so authorized, a declaration that such alienation would not limit the claims of native Hawaiians to the ceded lands. At the heart of the plaintiffs' claims, before the trial court and on appeal, is the Apology Resolution. The plaintiffs essentially believe that the title to the ceded lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished their claims over their ancestral territory and that, therefore, the defendants have a "fiduciary obligation to protect the corpus of the [p]ublic [l]ands [t]rust until an appropriate settlement is reached between native Hawaiians and the State."

Specifically, the plaintiffs argue that the trial court erred in concluding that: (1) the doctrine of sovereign immunity barred consideration of the plaintiffs' claims; (2) the defenses of waiver and estoppel barred the plaintiffs' requests for injunctive and declaratory relief with respect to the sale of the Leiali'i parcel; (3) the State's transfer of the Leiali'i parcel did not breach-and any future transfer of ceded lands would not breach-the State's fiduciary duties as trustee of the public lands trust of which the ceded lands are a part; and (4) the doctrine of political question barred the plaintiffs' requests for injunctive and declaratory relief. Additionally, the OHA plaintiffs assert that the trial court erred

in: (1) determining that their claim for injunctive relief with regard to the future sale of ceded lands in general was barred by the ripeness doctrine; and (2) making several evidentiary rulings.

Preliminarily, we believe it appropriate to first examine the language of the Apology Resolution inasmuch as the plaintiffs' current claim for injunctive relief is, as more fully described *infra*, based largely upon the Apology Resolution, which the defendants believe is inapplicable. We also believe it appropriate to examine related state legislation enacted around the same time that Congress adopted the Apology Resolution. In our view, this preliminary examination is critical to an understanding of the plaintiffs' claim for injunctive relief.

A. *The Apology Resolution and Related State Legislation*

The plaintiffs' claims for injunctive relief and, alternatively, for declaratory relief, are based on their belief that the "recognition in[, inter alia, the Apology Resolution] of the illegality of the transfer of lands and the ongoing reconciliation and negotiation process dramatically reinforces the State's fiduciary obligation to protect the corpus of the [p]ublic [l]ands [t]rust until an appropriate settlement is reached." Specifically, the OHA plaintiffs argue that the "Congressional recognition of illegality, and its accompanying call for a 'reconciliation' through a process now underway, has changed the legal landscape and restructured the rights and obligations of the State." The OHA plaintiffs further assert that

> the failure of the Apology Resolution to complete the process of settling [n]ative Hawaiian claims does not undercut its significance in rec-

> ognizing the bases for [the plaintiffs'] claims. ... As the [trial c]ourt explained, the Apology Resolution "confirms the factual foundation for the claims that previously had been asserted."

(Emphasis added.) Additionally, the OHA plaintiffs maintain that the "Apology Resolution by itself does not require the State to turn over the lands to the [n]ative Hawaiian people, but it puts the State on notice that it must carefully preserve these lands so that a subsequent transfer can take place when the political branches reach an appropriate resolution of this dispute."

The defendants admit that the Apology Resolution "posits that the overthrow was illegal and that the [c]eded [l]ands were transferred without compensation." However, relying on the disclaimer language contained therein, the defendants assert that "nothing in the Apology Resolution serves as a settlement of claims." Additionally, the defendants maintain that the Apology Resolution's "historical statements provide no guideline as to what remedy, if any, is appropriate."

The trial court, in analyzing the effect of the Apology Resolution on the plaintiffs' claims, stated:

> The Apology Resolution apologizes for the overthrow of the Kingdom of Hawai'i on January 17, 1893, with the participation of agents and citizens of the United States, and for the deprivation of the inherent rights of native Hawaiians to self-determination and sovereignty. It also supports, recognizes, and commends reconciliation efforts of the State of Hawai'i with native Hawaiians. *Congress concluded in this enactment of the Apology Resolution, which is binding upon this court, that*

> *the overthrow of the Kingdom of Hawai'i was in violation of treaties between the Kingdom and the United States and of international law, that it could not have been accomplished without the assistance of U.S. agents, and that the subsequent "cession" of these lands to the United States in 1898 was "without the consent of or compensation to the [n]ative Hawaiian people of Hawai'i or their sovereign government[.]"*
>
> ....
>
> Congress also expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i in order to provide a proper foundation for reconciliation between the United States and the [n]ative Hawaiian [p]eople, and urged the President of the United States to also acknowledge the ramifications and to support reconciliation efforts.
>
> *Although, by its terms, the 1993 Apology Resolution does not itself "serve as a settlement of any claims against the United States," or "result in any changes in existing law,"* [S. Rep. No. 103-123 (1993) at 35,] *or itself create a claim, right, or cause of action, [Rice v. Cayetano*, 941 F. Supp. 1529, 1546 n. 24 (D.Haw.1996), *rev'd on other grounds*, 528 U.S. 495 [120 S. Ct. 1044, 145 L. Ed. 2d 1007] (2000),] *it confirms the factual foundation for claims that previously had been asserted.*

(Emphases added.) (Footnotes omitted.)

As previously stated, the Apology Resolution was adopted by both the House and the Senate, signed by then-President Clinton on November 23, 1993, and des-

ignated as Public Law No. 103-150. Generally, when a joint resolution-such as the one at issue in this case-has emerged from legislative deliberations and proceedings, it is treated as law. *Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666, 50 S. Ct. 444, 74 L. Ed. 1098 (1930). Consequently, the rules applicable to statutory interpretation are also applicable to the Apology Resolution. Norman J. Singer, *Statutes and Statutory Construction* § 29:8 (6th ed. 2002); 82 C.J.S. *Statutes* § 306 (2007).

It is well-settled that,

> [w]hen construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And *we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.*

Coon v. City & County of Honolulu, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (emphasis added) (citation omitted). Additionally, "the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." *Keliipuleole v. Wilson*, 85 Hawai'i 217, 222, 941 P.2d 300, 305 (1997) (internal brackets and citations omitted). In other words, "a rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable[.]" *Id.* at 221-22, 941 P.2d at 304-05 (internal brackets and citation omitted). Moreover,

> [i]t is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and

> that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute.

Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) (citations omitted).

As previously quoted, the Apology Resolution states in relevant part:

> Whereas[,] *the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the [n]ative Hawaiian people of Hawaii or their sovereign government;*
>
> ...;
>
> Whereas[,] *the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;*
>
> ...;
>
> Whereas[,] *the health and well-being of the [n]ative Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;*
>
> ...; [and]
>
> Whereas[,] *the [n]ative Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with*

> *their own spiritual and traditional beliefs, customs, practices, language, and social institutions [.]*

Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphases added). Based on a plain reading of the above passages, we believe Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations. Equally clear is Congress's "express[ed] ... commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to *provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people." *Id.* We agree with the OHA plaintiffs that the "Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people[.]" In our view, the Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims.

The defendants place great reliance on the Apology Resolution's disclaimer that "[n]othing in [the resolution] is intended to serve as a settlement of any claims against the United States." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510. In so doing, they essentially maintain that the plaintiffs are precluded from using the language contained therein to establish or support a claim for the return of the ceded lands. When reading the disclaimer language—as we must—"in the context of the entire [Apology Resolution] and construe[ing] it in a manner consistent with its purpose," *Coon*, 98 Hawai'i at 245, 47 P.3d at 360, the disclaimer

provision dictates only that the Apology Resolution itself does not constitute a settlement of any of the unrelinquished claims to the ceded lands; in other words, it does not bestow upon native Hawaiians any *ownership interest* in the ceded lands. As we have stated, the Apology Resolution recognizes, *inter alia*, that native Hawaiians (1) never "directly relinquished their claims to ... their national lands to the United States" and (2) "are determined to preserve, develop and transmit to future generations their ancestral territory." If we were to determine, as the defendants appear to urge, that the disclaimer bars the plaintiffs from relying upon the Apology Resolution—a public law—in pursuing what the resolution clearly recognizes—their unrelinquished claims to the ceded lands,—we would be violating one of the cardinal rules of statutory construction, namely, that this court is bound "to give effect to all parts of a statute" so that "no clause, sentence, or word shall be construed as superfluous, void, or insignificant." *Camara*, 67 Haw. at 215, 685 P.2d at 797. Subscribing to the defendants' reading of the disclaimer would render superfluous the Apology Resolution's acknowledgment of the plaintiffs' unrelinquished claims to the ceded lands. In fact, given the Apology Resolution's clear contemplation of future reconciliation, i.e., settlement, it is not surprising that Congress would include the aforementioned disclaimer after having clearly acknowledged the illegality of the overthrow, the existence of the native Hawaiians' unrelinquished claims to the ceded lands, their deep feelings and attachment to those lands, and their determination to pursue their claims. Clearly, the Apology Resolution is not *per se* a *settlement* of claims, but serves as the *foundation* (or starting point) for reconciliation, includ-

ing the future settlement of the plaintiffs' unrelinquished claims.

Such interpretation is supported by the October 23, 2000 report, issued by the United States Departments of Interior and Justice (the Departments), entitled "From Mauka to Makai: The River of Justice Must Flow Freely."[15] As indicated by the trial court, the principal recommendation of the report states:

> It is evident from the documentation, statements, and views received during the reconciliation process undertaken by [the Departments] pursuant to [the Apology Resolution], that [n]ative Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. *As [a] matter of justice and equity, this report recommends that [n]ative Hawaiian people should have self-determination over their own affairs within the framework of*

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[15] In March 1999, Senator Daniel K. Akaka requested Secretary of the Interior Bruce Babbitt and Attorney General Janet Reno designate officials from their respective Departments whose task would be "to commence the reconciliation process." John Berry, Assistant Secretary, and Mark Van Norman, Director of the Office of Tribal Justice for the Department of Justice were so designated and commenced public consultations in Hawai'i in December 1999. Over forty hours of public statements were heard, and the public consultation process ended in two days of formal hearings on O'ahu. The Departments' report "contains recommendations [(including a 'proposed plan of action')] with respect to the continuation of the reconciliation process and should be read as merely the next step, as the United States and [n]ative Hawaiians move forward in further dialogue."

> *[f]ederal law*, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of [n]ative Hawaiians as an indigenous people within our nation through legislation, administrative action, and policy statements. *To safeguard and enhance [n]ative Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation* to clarify [n]ative Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative [n]ative Hawaiian governing body.

(Format altered.) (Emphases added.)

The above interpretation is also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution-specifically, Acts 354, 359, 329, and 340. Act 354, entitled "A Bill for an Act Relating to Hawaiian Sovereignty," stated in pertinent part that:

> On January 16, 1893, John L. Stevens, American minister in Hawai'i and friend of those supporting the annexation of Hawai'i to the United States, ordered the United States marines to invade Honolulu under the pretext of protecting American citizens and their property. Stevens thereafter recognized a new provisional government even before Queen Liliuokalani surrendered. The actions by the annexationists were condemned by President Cleveland's special envoy and the President himself. When President Cleveland refused to submit a treaty

of annexation to the Senate, the new provisional government established the Republic of Hawai'i which lasted until annexation in 1898. Sixty-one years later, Hawai'i became a state.

Until the provisional government was recognized by John L. Stevens, the Kingdom of Hawai'i was recognized as an independent nation by the United States, France, and Great Britain. Many native Hawaiians and others view the overthrow of 1893 and subsequent actions by the United States, such as supporting establishment of the provisional government and later the Republic of Hawai'i, the designation of the crown and government lands as public lands, annexation, and the ceding of the public lands to the federal government without the consent of native Hawaiians, as illegal. *Because the actions taken by the United States were viewed as illegal and done without the consent of native Hawaiians, many native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned* and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American peoples.

The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.

1993 Haw. Sess. L. Act 354, § 1 at 999-1000 (emphases added). In Act 359, also entitled "A Bill for an Act Relating to Hawaiian Sovereignty," the legislature made findings similar to those expressed in the Apology Resolution. 1993 Haw. Sess. L. Act 359, §§ 1-2 at 1009-11. The stated purpose of Act 359 was to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." 1993 Haw. Sess. L. Act 359, § 2 at 1010. The legislature established the Hawaiian Sovereignty Advisory Commission "to advise the legislature in carrying out the purposes of [the] Act." *Id.*,§ 4 at 1011. In enacting Acts 354 and 359, the legislature recognized that "the indigenous people of Hawai'i were denied ... their lands," 1993 Haw. Sess. L. Act 359, § 1(9) at 1010, and contemplated further action by the legislature to "to tak[e] steps to promote the restoration of the rights and dignity of native Hawaiians." 1993 Haw. Sess. L. Act 354, § 1 at 1000.

In 1997, the legislature enacted Act 329. 1997 Haw. Sess. L. Act 329, § 1 at 956-58. Act 329, which attempted to clarify "the proper management and disposition of the lands subject to the public land[s] trust and the proceeds and income therefrom, and to effectuate article XII, section 6 of the Hawai'i Constitution," stated that:

> The legislature finds that the events of history relating to Hawai'i and [n]ative Hawaiians, including those set forth in [the Apology Resolution] continue to contribute today to a deep sense of injustice among many [n]ative Hawaiians and others. *The legislature recognizes that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly ac-*

> *knowledges the past while moving into Hawaii's future.*
>
> The legislature further finds that over the last few decades, *the people of Hawai'i through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation.* Foremost among these achievements have been the creation of the [O]ffice of Hawaiian [A]ffairs and the allocation by legislative action to the [O]ffice of Hawaiian [A]ffairs of substantial funds out of a portion of the public land[s] trust established by section 5(f) of the Admission Act. The overriding purpose of this Act is to continue this momentum, through further executive and legislative action in conjunction with the people of Hawai'i, toward a comprehensive, just, and lasting resolution.

1997 Haw. Sess. L. Act 329, § 1 at 956 (emphases added).

Additionally, we observe that, in 1993, the legislature found that "the island of Kaho'olawe[16] is of significant cultural and historic importance to the native people of Hawai'i," 1992 Haw. Sess. L. Act 340, § 1 at 803, and dictated that:

> In 1990, the bombing and shelling of the island was halted by Congress and the President of the United States. A federal commission,

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[16] The island of Kaho'olawe was used by the United States "as a military target range since 1941." 1993 Haw. Sess. L. Act 340, § 1 at 803.

> known as the Kaho'olawe Island Conveyance Commission, was created by Congress to determine the terms of conveyance of the island to the State of Hawai'i.

Id.

> Upon ... return [of Kaho'olawe] to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public lands trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai'i.

Id. at § 2 at 806 (codified as HRS chapter 6K).

It is well-settled that native Hawaiian beneficiaries of the ceded lands trust have a "right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust." *Pele Defense Fund*, 73 Haw. at 601, 837 P.2d at 1262. Moreover, we have previously indicated in an analogous case dealing with the Hawaiian Homes Commission Act that the State, as trustee, "must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries." *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168. In describing the scope of the State's relevant fiduciary duties, this court, in *Ahuna*, analogized such duties to the fiduciary duties of the United States to native Americans by quoting, with approval, the words of the United States Supreme Court and stated:

> Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, *[the Gov-*

> *ernment] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.*

Id. at 339, 640 P.2d at 1169 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942)) (brackets and emphases in original) (format altered). In *Ahuna*, we held that "[t]he use of the term 'most exacting fiduciary standards' imports the notion that [this] court will strictly scrutinize the actions of the government." *Id.* at 339, 640 P.2d at 1169. Moreover, we observed that "the nature of the trust obligations of the [State] toward beneficiaries ... may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans[.]" *Id.* at 339, 640 P.2d at 1168. In particular, we cited three specific trust duties applicable to the State as trustee: (1) "the obligation ... to administer the trust solely in the interest of the beneficiary"; (2) the obligation that the trustee "deal impartially when there is more than one beneficiary"; and (3) the "obligation to use reasonable skill and care to make trust property productive[.]"[17] *Id.* at 340, 640 P.2d at 1169-70 (citations omitted).

As native Hawaiians, the individual plaintiffs are clearly beneficiaries of the ceded lands trust. Additionally, OHA, which is charged "with managing proceeds

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[17] In so doing, we stated that the "reasonable prudent person standard applies to protecting and caring for the [trust] property[.]" *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169.

derived from the ceded lands and designated for the benefit of native Hawaiians," *OHA II*, 110 Hawai'i at 341, 133 P.3d at 770 (citation omitted), can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust. The State, as trustee, is under an obligation to "administer the trust solely in the interest of the beneficiary" and to "deal impartially when there is more than one beneficiary." *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169-70 (citations omitted). As previously discussed, the Apology Resolution and the aforementioned related state legislation clearly contemplate that native Hawaiians (1) "never directly relinquished their claims to ... their national lands to the United States," and (2) "are determined to preserve, develop and transmit to future generations their ancestral territory." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510. As such, we believe and, therefore, hold that the Apology Resolution and related state legislation, discussed *supra*, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved. Such duty is consistent with the State's "obligation to use reasonable skill and care" in managing the public lands trust and the Ahuna court's declaration that the State's conduct "should ... be judged by the most exacting fiduciary standards." Ahuna, 64 Haw. at 339, 640 P.2d at 1169 (citations and emphasis omitted).

Keeping the aforementioned discussion and holding in mind, we now turn to examine the issues raised by the parties in this appeal-the first of which is the defendants' contention that the plaintiffs' claim for injunctive relief is barred by the doctrine of collateral estoppel.

B. *Collateral Estoppel*

Relying on *Ewa Marina*, the defendants assert, as they did before the trial court, that the plaintiffs are collaterally estopped from relitigating whether the State has the power to alienate ceded lands from the public lands trust. The OHA plaintiffs maintain that the trial court addressed the issue and "correctly rejected the argument presented by the [defendants]."

In *Ewa Marina*, the plaintiffs-OHA, Save Ewa Beach Ohana, and two individual plaintiffs-challenged the Board of Land and Natural Resources' (BLNR) issuance of a conservation district use area (CDUA) permit to Haseko, Inc. (Haseko). *Ewa Marina*, slip op. at 2. "Haseko submitted a CDUA permit application to the BLNR[,] seeking a permit to dredge a channel through state-owned submerged lands. The purpose of this permit was to allow Haseko to construct a 1400-slip marina as part of the proposed 'Ewa Marina development project." *Id.* BLNR conditionally granted Haseko's application for the CDUA permit on December 29, 1994. *Id.* at 8. The plaintiffs timely appealed the decision and order of the BLNR to the circuit court, which affirmed the decision of the BLNR. *Id.* at 8-9. The plaintiffs then appealed to this court, arguing, *inter alia*, that "the issuance of the permit violated the fiduciary obligations of the State of Hawai'i under section 5(f) of the ... Admission Act and the public trust doctrine" and that "issuance of the permit constitute[d] an improper disposition of public lands." *Id.* at 9.

This court upheld the decisions of the circuit court and BLNR, reasoning that "section 5(f) does not limit the use of the ceded lands themselves to the five purposes[ ] so long as the proceeds from the disposition of these lands are held in trust." *Id.* at 21. Additionally,

based on article XII, section 6 of the Hawai'i Constitution, this court concluded that the State

> has the power to dispose of ceded lands. The actual use to which these lands is put by this disposition does not have to comport with one of the five enumerated purposes in the Admission Act as long as fair compensation for the disposition of these lands is used for trust purposes. The actual issue in this case, therefore, is whether the issuance of the CDUA permit is a proper disposition of ceded lands.

Id. at 21-22 (emphasis added) (footnote omitted). This court held that the "grant of the permit for the dredging of a marina entrance channel has an undisputably public purpose" and that, therefore, "BLNR's conditional grant of the permit to Haseko did not violate the public trust doctrine and was a proper disposition of public lands." *Id.* at 26-27.

"Collateral estoppel is an aspect of *res judicata* which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies." *Pele Defense Fund*, 73 Haw. at 599, 837 P.2d at 1261 (citations omitted) (format altered). Thus, the elements of collateral estoppel are:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.

> *Keahole Def. Coal., Inc. v. Bd. of Land & Natural Res.*, 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006) (citations omitted) (format altered); *see also Citizens for the Prot. of the N. Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 102, 979 P.2d 1120, 1128 (1999). These elements "are tempered only by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues." *Pele Defense Fund*, 73 Haw. at 600, 837 P.2d at 1261 (citations omitted).

In this case, the trial court ultimately determined that *Ewa Marina* did not collaterally estop the plaintiffs' claims in this case because the "issue of whether the State has the power to ceded lands ... was not 'essential' to the final judgment in *Ewa Marina*, which merely decided whether the BLNR could issue a permit to *dredge* submerged ceded lands." (Emphases in original.) Curiously, the trial court also found that "the issue of whether the State could sell or dispose of ceded lands for public purposes was actually litigated." However, the trial court, after taking judicial notice of the files in the *Ewa Marina* case, seemingly concluded to the contrary, *i.e.*, that the plaintiffs in the instant case-against whom collateral estoppel is asserted-did not have a " 'full and fair opportunity' in *Ewa Marina* to litigate" the State's authority to alienate ceded lands from the public lands trust.

Nevertheless, the trial court appears to have correctly determined that two of the elements of collateral estoppel were met in this case, to wit: (1) there was a final judgment on the merits in the *Ewa Marina* case; and (2) the individual plaintiffs are privies of OHA for the purposes of collateral estoppel. However, it is apparent that the other two elements of collateral estop-

pel are not met here. First, the issue decided in *Ewa Marina*—"whether the issuance of the CDUA permit [was] a proper disposition of ceded lands," *Ewa Marina*, slip op. at 22 (footnote omitted),-is not identical to the issue raised by the plaintiffs in this case, *i.e.*, whether the State, as trustee, should be enjoined from alienating ceded lands from the public lands trust until such times as the claims of the native Hawaiian people to the ceded lands are resolved. Second, the issue whether such an injunction should be issued was not essential to the final judgment in *Ewa Marina* inasmuch as this court in *Ewa Marina* needed to determine only whether the State violated its fiduciary duties by issuing the CDUA permit. Accordingly, we hold that the trial court correctly determined that *Ewa Marina* did not collaterally estop the plaintiffs' claims in this case. We now turn to the plaintiffs' contentions on appeal as they relate to (1) the Leiali'i parcel and (2) the ceded lands in general. We then examine the political question doctrine and the plaintiffs' request for injunctive relief.

C. *The Leiali'i Parcel*

1. Sovereign Immunity

The trial court determined that the plaintiffs' claims with regard to the Leiali'i parcel were barred by sovereign immunity because title to the Leiali'i parcel had already been transferred to the HFDC. The trial court reasoned that, in order to return the Leiali'i parcel to the public lands trust, it would be required "to 'turn back the clock and examine actions already taken by the State.' " Thus, the trial court concluded:

> The Leali'i [sic] [parcel is] no longer in the [p]ublic [l]ands [t]rust. Although the [p]laintiffs

> argue that the [parcel was] merely transferred to another State entity and that sovereign immunity therefore does not apply, the facts show that the State of Hawai'i received payment for the transfer of [this parcel] to the HFDC. [HRS §] 171-2 specifically exempts from the definition of "public lands" those lands to which the HFDC holds title in its corporate capacity. To return the [parcel] at Leali'i [sic] to the [p]ublic [l]ands [t]rust, the DLNR would have to expend moneys from the State treasury. Moreover, the HFDC has already spent millions of dollars improving those properties.
>
> Accordingly, this court cannot compel HFDC to return the [parcel] at Leali'i [sic] to the [p]ublic [l]ands [t]rust without directly affecting the state treasury. Pursuant to Pele Defense Fund v. Paty, [73 Haw. 578, 837 P.2d 1247 (1992),] [the p]laintiffs' request for injunctive relief ... with respect to Leali'i [sic] is, therefore, barred by sovereign immunity.

On appeal, the plaintiffs argue that the trial court erred in concluding that their claim with regard to the Leiali'i parcel was barred by the doctrine of sovereign immunity. Specifically, the plaintiffs take issue with the trial court's reliance on *Pele Defense Fund*. The plaintiffs assert that their claim regarding the Leiali'i parcel was not barred by sovereign immunity because the claim is for prospective injunctive relief. Additionally, the OHA plaintiffs contend that: (1) the requested injunction would not directly affect the State treasury inasmuch as the transfer "from DLNR to HFDC was a paper transaction shifting title from one State agency to another for which DLNR received a mere $1[.00]"; and (2) the "dispute over the Leiali'i [parcel] involves

governmental agencies rather than private parties." Consequently, the OHA plaintiffs argue that the case at bar is distinguishable from *Pele Defense Fund*.

The defendants, on the other hand, believe—as did the trial court—that "the State has already transferred the Leiali'i [parcel] to HFDC" and, therefore, to return the parcel to the public lands trust, "DLNR would have to expend moneys from the State treasury." The defendants, therefore, maintain that the trial court correctly determined that *Pele Defense Fund* mandates the conclusion that the plaintiffs' claim is barred by sovereign immunity. Moreover, the defendants argue that the exception to sovereign immunity recognized in *Pele Defense Fund*—"for 'the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawai'i constitutional and statutory provisions governing the public land trust' "—is inapplicable in this case "because the Admission Act and state constitutional and statutory provisions explicitly authorize the State to sell ceded lands."

> The doctrine of sovereign immunity dictates that
>
> the State cannot be sued without its consent or waiver of its immunity in matters "involving the enforcement of contracts, treasury liability for tort, and the adjudication of interest in property which has become unsullied by tort into the bosom of government." However, *sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional. Nor will sovereign immunity bar suits to enjoin state officials from violating state statutes.*

Pele Defense Fund, 73 Haw. at 607, 837 P.2d at 1265 (emphasis added) (internal brackets, ellipsis, and citations omitted) (format altered). Additionally, this court has adopted the rule from Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which makes an important distinction between prospective and retrospective relief. Id. at 609, 837 P.2d at 1266.

> *If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury.* However, relief that is tantamount to an award of damages for a past violation of law, even though styled as something else, is barred by sovereign immunity.

Id. at 609-10, 837 P.2d at 1266 (emphasis added) (citations, ellipsis, footnote, and internal quotation marks omitted). The burden is on the State to prove "with specific facts that the effect on the State treasury will be directly, substantially, and quantifiably impacted." *OHA II*, 110 Hawai'i at 357, 133 P.3d at 786 (footnote omitted).

Pele Defense Fund involved a claim brought by a non-profit corporation comprised of native Hawaiian beneficiaries of the section 5(f) Admission Act trust, challenging the exchange of ceded lands in Puna on the island of Hawai'i for privately owned lands. 73 Haw. at 584-85, 837 P.2d at 1253. The plaintiff prayed for, *inter alia*, injunctive relief to restore the Puna parcel to the public lands trust, arguing that the transfer constituted a breach of the trust created under section 5(f) and article XII, section 4 of the Hawai'i Constitution. *Id.* This court held that, although the plaintiff's claim was

couched as a claim for prospective injunctive relief, its "request that the trust status of the exchanged lands be restored by means of a constructive trust [was] essentially equivalent to a nullification of the exchange and the return of the exchanged lands to the trust res." *Id.* at 611, 837 P.2d at 1267 (internal quotation marks omitted). This court, therefore, concluded that the "effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands [then privately owned] would require ... the State to compensate [the purchaser] for its property." *Id.* at 611, 837 P.2d at 1267 (citations omitted). Consequently, we held that the plaintiff's "requested relief [was], in effect, a request for compensation for the past actions of the [State]" and was, accordingly, barred by sovereign immunity. *Id.*

Subsequent cases decided by this court have reaffirmed the continued viability of the analysis articulated in *Pele Defense Fund*. *See, e.g.*, *OHA II*, 110 Hawai'i at 356-57, 133 P.3d at 785-86 (holding that, under *Pele Defense Fund*, plaintiffs' claims alleging a breach of the State's fiduciary duties were barred by sovereign immunity because the plaintiffs requested relief—a share of revenues that the State had collected from the ceded lands trust—was essentially a request for past monetary damages, and, therefore, the relief requested was "retrospective"); *Bush v. Watson*, 81 Hawai'i 474, 481-82, 918 P.2d 1130, 1137-38 (1996) (holding that claims by native Hawaiian homestead lessees, challenging the validity of third-party agreements (TPAs) between other lessees and non-Hawaiian farmers as violating the Hawaiian Homes Commission Act, were not barred by sovereign immunity because they sought declaratory and injunctive relief that would void existing TPAs and enjoin the Hawaiian Homes Commission

from approving future TPAs); *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 208 n. 26, 891 P.2d 279, 295 n. 26 (1995) (noting that, with respect to claims against state officials, claimants cannot recover money damages or the equivalent for past violations of law; nevertheless, relief that is prospective in nature may be allowed regardless of the state's sovereign immunity).

Most recently, this court affirmed the *Pele Defense Fund* analysis in *Kaho'ohanohano v. State*, 114 Hawai'i 302, 162 P.3d 696 (2007). *Kaho'ohanohano* involved a class action lawsuit brought by members of the Employees' Retirement System of the State of Hawai'i (ERS), the State of Hawai'i Organization of Police Officers, and the trustees of ERS [hereinafter, the plaintiffs] against the State alleging a breach of trust. *Id.* at 310, 162 P.3d at 704. The plaintiffs sought declaratory and injunctive relief based on a challenge to a statute that authorized the diversion of $346.9 million from the ERS fund, which the plaintiffs alleged violated the State's constitutional and contractual obligations to ERS members. *Id.* at 315, 162 P.3d at 709. This court determined that, inasmuch as the State had not expressly waived sovereign immunity and the plaintiffs did not claim money damages, "the relevant inquiry [was] whether the relief sought for a past violation of law [was] 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Id.* at 337, 162 P.3d at 731 (citation and other internal quotation marks omitted).[18] Ultimately, this

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[18] We note that this court's conclusion in *Kaho'ohanohano* is inconsistent with *Bush*, wherein we "decline[d] to adopt the federal courts' narrow view that a claim for relief based on past illegal action is necessarily 'retrospective[,]' " holding instead that "the cru-

court concluded that, by granting the plaintiffs' requested relief, the effect on the state treasury, if any, would be only "ancillary" inasmuch as the state would be prohibited from any future " skimming" from the ERS fund. *Id.* Accordingly, this court held that the plaintiffs' claims were not barred by sovereign immunity. *Id.* at 337-38, 162 P.3d at 731-32.

In this case, the plaintiffs seek to enjoin the actions of state executive officials from transferring the Leiali'i parcel because they believe such transfer would further diminish the corpus of the public lands trust-in violation of the State's constitutional and statutory fiduciary duties-before their unrelinquished claims to the ceded lands could be resolved. As in *Kaho'ohanohano*, the State, here, has not expressly waived sovereign immunity, and the plaintiffs do not claim money damages. Although the plaintiffs characterize their claim with respect to the Leaili'i parcel as being one for prospective injunctive relief, *i.e.*, enjoining the transfer of the Leiali'i parcel, the parcel was, in fact, transferred from DLNR to HFDC on the same day the plaintiffs filed suit. Accordingly, in this case, as in *Kaho'ohanohano*,"the relevant inquiry is whether the relief sought for a past violation of law[, *i.e.*, the transfer of property,] is 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Kaho'ohanohano*, 114 Hawai'i at 337, 162

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cial inquiry under our sovereign immunity principles is whether the relief sought for a past violation of law is 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Bush*, 81 Hawai'i at 482 n. 9, 918 P.2d at 1138 n. 9 (citations omitted).

P.3d at 731 (some internal quotation marks and citation omitted).

Unlike *Pele Defense Fund*, in which ceded lands were exchanged for privately owned lands, the Leiali'i parcel was transferred from one state agency to another, *i.e.*, from DLNR to HFDC. Moreover, the consideration of $1.00 was also paid from one state agency to another. In other words, the return of the property and purchase price between both state agencies effectively changes nothing. Both the parcel and the $1.00 would remain within the control of the State. To the contrary, because the lands at issue in Pele Defense Fund had been transferred to a private third-party, this court concluded that *the State would have to compensate the private third-party* for the return of the property in the public lands trust. 73 Haw. at 611, 837 P.2d at 1267. In that regard, *Pele Defense Fund* is distinguishable from the instant case because the Leiali'i parcel would remain within the control of the State. Returning the parcel to the public lands trust would require only that the HFDC transfer title back to DLNR and that DLNR pay only $1.00 for such transfer. As such, the effect on the State treasury, if any, would be only ancillary.

However, in concluding that sovereign immunity barred the plaintiffs' claims with regard to the Leiali'i parcel, the trial court additionally relied upon the fact that, prior to the transfer of the Leiali'i parcel, HFDC had spent $31 million developing infrastructure on the property. In so doing, the trial court did not provide any explanation as to how the expenditure of $31 million *prior* to the plaintiffs' filing of the present lawsuit resulted in a "direct" as opposed to "ancillary" effect on the state treasury. We further observe that the parties do not any present argument on this issue.

Although we recognize that $31 million dollars is a significant sum of money, that fact alone is insufficient to support a conclusion that such past expenditure constitutes a "direct" future effect on the state treasury. Indeed, as previously stated, sovereign immunity does not bar a claim for prospective injunctive relief "*even though accompanied by a substantial ancillary effect on the state treasury.*" *Pele Defense Fund*, 73 Haw. at 609, 837 P.2d at 1266 (emphasis added) (internal quotation marks, citation, and footnote omitted). In the case at bar, the plaintiffs are not asking that the $31 million be returned to them or even to the state treasury. Moreover, the benefit of the $31 million expenditure by HFDC on infrastructure remains with the State. Thus the plaintiffs' requested relief—*i.e.*, an injunction—is not "tantamount to an award of damages for a past violation of law." *Id.* at 609-10, 837 P.2d at 1266 (internal quotation marks, citation, and ellipsis omitted). As such, the effect of the expenditure of $31 million on the state treasury is "ancillary"—albeit a substantial one. We, therefore, hold that the plaintiffs' claim for injunctive relief with regard to the Leiali'i parcel is not barred by sovereign immunity. Accordingly, we also hold that the trial court erred in determining otherwise.

2. Waiver and Estoppel

The plaintiffs argue that the trial court erred in determining that the defenses of waiver and estoppel barred the plaintiffs' request for injunctive relief with respect to the Leiali'i parcel. Because waiver and estoppel are distinct doctrines, we analyze them separately below.

a. *waiver*

The trial court concluded that the

> [p]laintiffs, by their actions and inactions during the seven years between 1987 and 1994 ... waived any right they may have had to contest the sale of [the Leiali'i parcel] to HFDC as illegal.
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> ....
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> The [i]ndividual [p]laintiffs argue that they and their counsel relied on Congress's 1993 Apology Resolution and the Legislature's Act 359 of 1993 as central bases to seek an injunction in the fall of 1994 on the sale of ceded lands, pending resolution of the Hawaiians' claim to ownership of the ceded lands. Mr. Meheula's discussions with the OHA Board did cause OHA to insist in the fall of 1994 that a disclaimer be placed in the HFDC agreements.
>
> As a practical matter, however, neither OHA nor the [i]ndividual [p]laintiffs objected to the sale of the [Leiali'i parcel] until the fall of 1994. In any event, even if the [p]laintiffs did not consider challenging the State's power to sell ceded lands until after the Apology Resolution was adopted in 1993, OHA's continuing to negotiate for market value after the Apology Resolution was passed is also "conduct from which an intention to waive may reasonably be inferred." [The p]laintiffs' failure to object to the development plan, which included market homes, before the LUC and Legislature in testimony relating to Act 318 is "wholly inconsistent with any dissatisfaction" with the devel-

> opment plan, also suggesting waiver of any right to challenge them. [*Goo v. Hee Fat*, 34 Haw. 123, 129 (1997) [(1937)], *overruled on other grounds by Goo v. Goo*, 36 Haw. 530 (1943).]
>
> Moreover, HFDC and the State were prejudiced by their reliance on [p]laintiffs' acquiescence in the development plan to sell [the Leiali'i parcel]. As testified to by the project managers for both Leali'i [sic] and La'i'opua, there were no objections from OHA as to the State's power to sell public trust lands for those projects until November 1994. By that time, however, $31 million had already been invested in Leali'i [sic].

(Footnotes omitted.)

The plaintiffs argue that they did not waive their claim with regard to the Leiali'i parcel. The OHA plaintiffs' [sic] maintain that,

> [a]fter the passage of the Apology Resolution, and as the full import of the congressional findings that [c]rown, [g]overnment and [p]ublic lands were ceded to the United States "without the consent of or compensation to the [n]ative Hawaiian people of Hawai'i or their sovereign government" and that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States[ ]" became evident, the OHA Trustees took appropriate action to assure that the claim to the "national lands" of the [n]ative Hawaiian people was properly asserted.

As indicated by the trial court, the individual plaintiffs posit that, "[a]lthough OHA did not earlier object to the transfer of ceded lands for the ultimate sale to homeowners in the Leiali'i project, the 1993 legislation [(*i.e.*, the Apology Resolution, as well as, Acts 359 and 329, discussed *supra*)] and Mr. Meheula's discussions with the OHA Board in [September 1994] were new events that justified their objection in [September 1994]."

Relying on the ruling and rationale of the trial court, the defendants maintain that the plaintiffs waived their claims regarding the Leiali'i parcel because the "[p]laintiffs' failure to object to the development plan at the LUC and before the Legislature in testimony relating to Act 318 [(setting forth a formula to compensate OHA for the 'villages of Leiali'i, Maui and villages of La'i'opua, Hawai'i')] is 'wholly inconsistent with any dissatisfaction' with the development plan ... and[, therefore,] clearly waived any right to challenge the plan." The defendants further maintain that, "[e]ven if plaintiffs did not think to challenge the State's power to sell [c]eded lands until after the Apology Resolution, OHA's continuing to negotiate for 'market value' after the Apology Resolution was passed is clearly 'conduct from which an intention to waive may reasonably be inferred.' "

This court has defined waiver as "an intentional relinquishment of a *known right*, a voluntary relinquishment of rights, and the relinquishment or refusal to use a right." *Coon v. City & County of Honolulu*, 98 Hawai'i 233, 261, 47 P.3d 348, 376 (2002) (emphasis added) (citation omitted).

> To constitute a waiver, there must have existed a right claimed to have been waived and the

> waiving party *must have had knowledge, actual or constructive, of the existence of such a right at the time of the purported waiver.* While the question whether a valid waiver exists is generally a question of fact, "when the facts are undisputed it may become a question of law." *Hawaiian Homes Comm'n v. Bush*, 43 Haw. 281, 286 (1959) (citations omitted); *see also Stewart v. Spalding*, 23 Haw. 502, 517 (1916) ("The question of waiver is usually a mixed one of law and fact but where the facts are undisputed and are susceptible of but one reasonable inference it becomes one of law for the court." (Citations omitted.)).

Id. at 261-62, 47 P.3d at 376-77 (some citations and original ellipsis omitted) (emphasis added). Furthermore,

> [w]aiver must be intentional. Such intention may be indicated by language or conduct, may be either express or implied but does not necessarily imply that one has been misled to his prejudice or into an altered position. Waiver depends upon the intention of the party who is charged with the waiver.... It may be proven by an express declaration of the party charged with the waiver. It may also be proved by the existence of acts or language so inconsistent with the purpose of the person charged to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary.

Hewahewa v. Lalakea, 35 Haw. 213, 218-19 (1939) (emphasis added) (internal quotation marks and citations omitted).

In this case, the record indicates that the first time that OHA had knowledge that DLNR intended to alienate the Leiali'i parcel from the public lands trust for the purposes of residential development was in December 1989 when HFDC filed a petition with the LUC to reclassify the Leiali'i parcel from agriculture to urban use. It is undisputed that OHA did not object to the transfer of the Leiali'i parcel and participated in negotiations with HFDC regarding the parcel's fair market value, pursuant to Act 318. As previously stated, it was not until the adoption of the Apology Resolution that OHA requested the disclaimer that its acceptance of funds would not affect any further claim the native Hawaiian people may have to the Leiai'i parcel. When HFDC declined to honor their request, the plaintiffs filed suit.

In support of their position that they did not waive their claim with regard to the Leiali'i parcel, the plaintiffs essentially maintain that the Apology Resolution gave rise to their breach of trust claim. Pointing to language in the Apology Resolution that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, the plaintiffs submit that title to the ceded lands is now clouded.

Having held that the Apology Resolution and related state legislation give rise to a fiduciary duty by the State, as trustee, to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved, it necessarily follows that it was not until at least November 23, 1993, when the Apology Resolution was signed into law by President

Clinton, that the plaintiffs "had knowledge, actual or constructive, of the existence of ... a right [claimed to have been waived] at the time of the purported waiver." *Coon*, 98 Hawai'i at 261, 47 P.3d at 376 (citation omitted). Consequently, we cannot say that the plaintiffs' purported waiver was "intentional," expressly or impliedly. *Hewahewa*, 35 Haw. at 218. Accordingly, we hold that the trial court's conclusion that OHA's actions between 1987 and 1994 constituted a waiver of the plaintiffs' claims was clearly erroneous and that, therefore, the trial court erred in determining that the plaintiffs waived their claim for injunctive relief with regard to the Leiali'i parcel.[19]

b. *estoppel*

The trial court ruled that, "[f]or the same reasons that [the p]laintiffs waived any challenge to the legality of the sales of Leali'i [sic] lands, [the p]laintiffs are estopped from making that challenge." Specifically, the trial court found that,

> [a]pplying equitable estoppel and quasi estoppel principles to the case at hand, during the years of negotiations and planning for Leali'i [sic] before [the p]laintiffs filed this lawsuit,

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[19] The trial court also based its holding on the fact that the defendants expended over $31 million dollars on improvements to the Leiali'i parcel prior to the transfer from DLNR to HFDC. However, the question on waiver is strictly whether the party charged with waiver intended to waive a known claim, *Hewahewa*, 35 Haw. at 218-19, not whether the party seeking to prove waiver was prejudiced, as was determined by the trial court. As such, the trial court's finding that, because OHA did not object to the transfer of the Leiali'i parcel until 1994, HFDC and the State were prejudiced by their reliance on the plaintiffs acquiescence in the project does not apply to an analysis of waiver.

[the p]laintiffs did not suggest that they would file a lawsuit challenging the right to sell the [Leiali'i parcel] to HFDC and in turn to third parties for their homes. During these same five years, the [p]laintiffs had notice of the planned development at Leali'i [sic], but chose not to challenge it. The State spent substantial amounts of time and money developing [the parcel] before November 1994 when [the p]laintiffs first filed suit.

By their action (or inaction with respect to the [i]ndividual [p]laintiffs) and conduct ... [the p]laintiffs caused the HFDC to believe that no one would challenge its acquisition of the [Leiali'i parcel] as long as OHA and DLNR received fair monetary compensation for the lands. [The p]laintiffs' acquiescence in the development of Leali'i [sic] and HFDC's expenditure of funds for infrastructure, and OHA's active participation in negotiations for an appraised value for the ceded lands induced the State to continue moving forward with the housing development. The State obtained necessary land use changes, entered into agreements with developers, made agreements with county officials and spent over $31 million for infrastructure at Leali'i [sic] alone. The State significantly altered its position because of the statements and conduct of OHA, as well as the inaction of the [i]ndividual [p]laintiffs. [The p]laintiffs are, therefore, also estopped from challenging the State's sale of public trust lands at Leali'i [sic].

It is true, as argued by the OHA [p]laintiffs, that the doctrine of equitable estoppel cannot

> be invoked against a governmental agency such as OHA in the absence of overt detrimental reliance and "manifest injustice." The law recognizes that governmental bodies must be able to change their minds in some circumstances. Thus, a mere change of mind by the government does not invoke estoppel unless the other party had detrimentally relied upon the agency's earlier position to such an extent that it would constitute a "manifest injustice" to fail to invoke and apply the doctrine. In this case, however, based on the facts above, the requisite showings of extensive detrimental reliance by and manifest injustice to the [d]efendants have been satisfied to invoke equitable estoppel against the OHA plaintiffs. Thus, the doctrine of estoppel prohibits both sets of [p]laintiffs from seeking injunctive relief with respect to the sale of [the Leiali'i parcel].

(Internal footnotes omitted.) (Format altered.)

The OHA plaintiffs argue that the trial court erred in concluding that the doctrine of estoppel barred the plaintiffs claims because it is "manifestly unjust to [n]ative Hawaiians to allow alienation of [c]eded [l]ands-their national lands-prior to a final resolution of the [n]ative Hawaiian land claim." Additionally, the OHA plaintiffs argue that the application of the doctrine of equitable estoppel against the government is not favored, and, furthermore, "there can be no suggestion here that OHA wilfully misled the HFDC in its earlier position on the Leiali'i [parcel] or acted in bad faith." The individual plaintiffs appear to contend that estoppel is not applicable in this case because it is an equitable defense, which cannot be raised against the plaintiffs because "the 1993 Legislation obligated the

State to seek instructions from the [c]ourt before selling ceded lands without prompting by [the p]laintiffs."

The defendants insist that the trial court correctly determined that the plaintiffs were estopped from challenging the transfer of the Leiali'i parcel because the "unchallenged findings of facts show that HFDC spent more than $31 million at Leiali'i over a seven-year period in reliance on OHA's failure to object to the project." Accordingly, the defendants assert that "[t]hese facts squarely raise the defense of equitable estoppel[.]"

"The theory of equitable estoppel requires proof that one person wilfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous belief to his or her detriment." *Potter v. Hawai'i Newspaper Agency*, 89 Hawai'i 411, 419, 974 P.2d 51, 59 (1999) (citation omitted). "A species of equitable estoppel, the principle of quasi estoppel, precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken." *Id.* at 420, 974 P.2d at 60 (internal brackets and citation omitted).

As the OHA plaintiffs correctly point out, "[t]he application of the doctrine of equitable estoppel against the government is not favored." *Turner v. Chandler*, 87 Hawai'i 330, 333, 955 P.2d 1062, 1065 (App. 1998) (citations omitted). However, this court has also stated that the doctrine "is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice." *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 126, 566 P.2d 725, 737 (1977) (internal quotation marks and citation omitted).

As previously discussed, it was not until the Apology Resolution was signed into law on November 23,

1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis. Consequently, the plaintiffs cannot be deemed to have "wilfully caused [the defendants] to erroneously believe *a certain state of things*," *Potter*, 89 Hawai'i at 419, 974 P.2d at 59, upon which the defendants relied to their detriment.

Accordingly, we conclude that the trial court incorrectly determined that the plaintiffs were estopped from challenging the transfer of the Leiali'i parcel based on their pre-1993 actions and hold that the plaintiffs' claims are not barred by the principles of equitable and quasi estoppel. We now turn to the plaintiffs' arguments as they relate to the ceded lands in general.

D. *The Ceded Lands in General*

1. Sovereign Immunity

With regard to ceded lands in general, the trial court concluded that:

> Case law has held that sovereign immunity does not bar a suit for injunctive relief to prohibit state officials from acting in an illegal manner. [(Citing in a footnote to *Pele Defense Fund, supra.*)] The State of Hawai'i has not consented, however, to be sued in a lawsuit contesting the validity of its title to the ceded lands. "It is the law in this jurisdiction that a proceeding against property in which the State of Hawai'i has an interest is a suit against the State and cannot be maintained without the consent of the State," so that the State "and its interest in land are immune from suit." [(Cit-

> ing in a footnote to *A.C. Chock, Ltd. v. Kaneshiro*, 51 Haw. 87, 88, 451 P.2d 809, 811 (1969).)] "If it is made to appear at any stage of the case that the State claims title, the court's jurisdiction over the merits of such claim thereby is ousted under the doctrine of sovereign immunity." [(Citing in a footnote to *Marks v. Ah Nee*, 48 Haw. 92, 94, 395 P.2d 620, 622 (1964).)]
>
> A claim for injunctive and declaratory relief would have the effect of depriving the State of control over public lands under [HRS] chapters 171 and 201E is the "functional equivalent of a quiet title action," and is barred by sovereign immunity. [(Citing in a footnote to *Idaho v. Couer [Coeur] d'Alene Tribe*, 521 U.S. 261 [117 S. Ct. 2028, 138 L. Ed. 2d 438] (1997).)] Looking beyond the pleadings to "examine the effect" of the suit and "its impact on these special sovereignty interests [of the State]," sovereign immunity bars [p]laintiffs' claims to the extent they seek relief based on an allege [sic] cloud on the State's title to ceded lands. Where the "requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters," and "would diminish, even extinguish, the State's control over a vast reach of land and waters long deemed by the State to be an integral part of its territory," sovereign immunity applies. [(Citing in a footnote to *Couer [Coeur] d'Alene*)]

(Internal footnotes omitted.)

The plaintiffs take issue with the trial court's reliance on *Coeur d'Alene*. Specifically, the plaintiffs chal-

lenge the trial court's determination that their claims with regard to the sale of ceded lands in general "were the functional equivalent of a quiet title action"[20] and, therefore, barred by sovereign immunity inasmuch as " '[i]t is the law in this jurisdiction that a proceeding against property in which the State of Hawai'i has an interest in is a suit against the State and cannot be maintained without the consent of the State[.]' " On appeal, the OHA plaintiffs contend that they are not seeking ownership of property from this court, but "*only* an order prohibiting the transfer of [c]eded [l]ands pending the resolution of [n]ative Hawaiian claims." (Emphasis in original.) As such, the OHA plaintiffs argue that the trial court's reliance on *Coeur d'Alene*, discussed *infra*, was error. The OHA plaintiffs submit that the trial court should have, instead, been guided by *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999), discussed *infra*. The individual plaintiffs similarly maintain that they "do not seek an ownership determination or even a declaration that they are entitled to the beneficial use and/or occupancy of the ceded lands."

The defendants, however, contend that the trial court correctly relied on *Coeur d'Alene* because, as in this case, " 'the requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed

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[20] An action to quiet title is defined as an action brought "by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim." HRS § 669-1(a) (1993).

lands and waters,' and 'would diminish, even extinguish the State's control over a vast reach of lands ... long deemed by the State to be an integral part of its territory.' " (Citing *Coeur d'Alene*, 521 U.S. at 282, 117 S. Ct. 2028).

In *Coeur d'Alene*, the sole issue before the Court was whether the federally recognized Coeur d'Alene Tribe's (the Tribe) suit against the State of Idaho, seeking "the beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters (the 'submerged lands') within the original boundaries of the Coeur d'Alene Reservation," was barred by sovereign immunity. 521 U.S. at 264-65, 117 S. Ct. 2028. The Tribe styled its suit as a claim for declaratory and injunctive relief, "alleging an ongoing violation of its property rights in contravention of federal law and [seeking] prospective injunctive relief." *Id.* at 266, 281, 117 S. Ct. 2028. The Court recognized that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* [exception].[21] However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281, 117 S. Ct. 2028. The Court, in its principal

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[21] As previously indicated, this court, in Pele Defense Fund, adopted the rule expressed in *Ex Parte Young*, which differentiated between prospective and retrospective relief. 73 Haw. at 609, 837 P.2d at 1266. Accordingly, it is the law in this state that, "[i]f the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury." *Id.* (internal quotation marks and citations omitted); see discussion supra.

decision, determined that the Tribe's suit was the functional equivalent of a quiet title action "in that substantially all benefits of ownership and control [in the submerged lands] would shift from [Idaho] to the Tribe." *Id.* at 282, 117 S. Ct. 2028. Moreover, the Court reasoned that the submerged lands "have historically been considered 'sovereign lands[,' and] State ownership of them has been considered an essential attribute of sovereignty." *Id.* at 283, 117 S. Ct. 2028 (internal quotation marks and citation omitted). The Court concluded:

> It is apparent, then, that[,] if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 287-88, 117 S. Ct. 2028.

In a concurring opinion, Justice O'Connor seemingly attempted to clarify the Court's decision by distinguishing *Coeur d'Alene* from *Ex parte Young*. She noted that

> the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law. Rather, the Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only

> that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all.

Id. at 289, 117 S. Ct. 2028 (O'Connor, J., concurring).

As previously stated, the OHA plaintiffs suggest that the trial court erred in applying the *Coeur d'Alene* analysis and should look instead to the Eighth Circuit's opinion in *Mille Lacs*. In *Mille Lacs*, the Mille Lacs Band of Chippewa Indians (the Band), amongst others, brought an action for injunctive and declaratory relief, seeking to enforce its alleged treaty rights to hunt, fish, and gather on state and private lands free of state regulation. 124 F.3d at 914. The Eighth Circuit held that the Band's claims were not barred by sovereign immunity, reasoning, inter alia, that the Bands' claims "[sought] prospective injunctive relief against state officials in their official capacities for continuing violations of the Bands' federal treaty rights. As such, they fall squarely within the *Ex parte Young* exception to the [sovereign immunity doctrine]." *Id.* The court further noted that its holding was supported by the *Coeur d'Alene* Court's concurring opinion, which observed that "[a] *Young* suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id.* (quoting *Coeur d'Alene*, 521 U.S. at 294, 117 S.Ct. 2028 (O'Connor, J., concurring)) (internal quotation marks omitted).

In the present case, the plaintiffs, unlike the *Coeur d'Alene* plaintiffs, do not seek a determination from this court that would shift "the benefits of ownership and control [of the ceded lands] from the State to [themselves]." *Coeur d'Alene*, 521 U.S. at 282, 117 S. Ct.

2028. Rather, they seek only to enjoin the defendants from alienating ceded lands.

Based on *Mille Lacs* and Justice O'Connor's concurrence in *Coeur d'Alene*, a claim seeking injunctive relief with regard to property rights may be maintained, if it falls within the *Young* exception, *i.e.*, allowing only prospective injunctive relief. Here, as the plaintiffs have repeatedly made clear, they are not asking this court to return the ceded lands to the possession of the plaintiffs; they seek only an injunction barring the *future* alienation—by way of sale or transfer—of ceded lands until their unrelinquished claims to those lands are resolved via the reconciliation process contemplated by the Apology Resolution and related state legislation. As such, the plaintiffs' requested relief is clearly prospective in nature and, therefore, not barred by sovereign immunity under the *Young* exception.

Based on the foregoing discussion, we hold that the plaintiffs' claims with regard to the sale or transfer of the ceded lands in general are not barred by sovereign immunity. Accordingly, we also hold that the trial court incorrectly determined that sovereign immunity barred the plaintiffs' claims.[22]

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[22] In addition to the arguments stated above, the individual plaintiffs, in their opening brief, argue that the State waived sovereign immunity under the "Native Hawaiian Trusts Judicial Relief Act" contained in HRS chapter 673 (Supp. 2006). However, in a previous motion filed with the circuit court, the individual plaintiffs argued that "[c]hapter 673, Native Hawaiian Trusts Judicial Relief Act, does not permit [n]ative Hawaiians to sue the State for return of ceded lands." Inasmuch as the individual plaintiffs admit in a prior pleading that HRS chapter 673 does not apply in this situation and there is no other mention of this argument in the

2. Ripeness

The trial court, in ruling that the plaintiffs' claims with regard to the ceded lands in general were also barred by the ripeness doctrine, stated:

> With respect to "ripeness," *Pele Defense Fund* makes clear that beneficiaries of the ceded lands trust have standing to bring suit to enjoin disposition of ceded lands that would constitute breaches of trust. No evidence was presented, however, of any proposed sales of ceded lands other than at Leali'i [sic]. In fact the evidence suggests that the State has been following a self[-]imposed moratorium on the sales of additional ceded lands.[23] Proposed sales could con-

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proceedings before the trial court, the plaintiffs have waived this argument.

[23] In explaining the "self-imposed moratorium," the trial court stated:

> The Administrator for the Lands Division of the DLNR [(*i.e.*, Michael Wilson)] wrote [a memorandum] to [the] then Chair of DLNR, stating that "a moratorium" on the sale of ceded lands was in effect[ ] and that "the current moratorium is based on the concern that the sale of ceded lands diminishes the corpus of the public lands and thereby diminished the potential return to OHA [[hereinafter, the Wilson Memorandum]]."
>
> At trial, Gilbert Coloma-Agaran, chair of the BLNR, testified regarding the Wilson Memorandum as follows:
>
> Q [By OHA Plaintiffs' Counsel]: ... So, were you working for Michael Wilson at the time, deputy director?
>
> A: [By Coloma-Agaran]: In April '95, yes.
>
> Q: Are you familiar with that memorandum?

> stitute breaches of trust, but ... not all sales of ceded lands would violate the ceded lands trust.

The OHA plaintiffs argue that the trial court erred in determining that their claims were not ripe because "the court need not resolve the breach of trust issue in order to grant injunctive relief." Additionally, the OHA plaintiffs assert that

> the [trial] court's ruling places [the plaintiffs] on the horns of a dilemma. [The plaintiffs] it seems, filed both too early and too late. [They] waited too long on the Leiali'i parcel and not long enough on the moratorium. [The plaintiffs] must wait until the State takes preliminary steps to enjoin the sale of [c]eded [l]ands, but because the State took preliminary steps in the Leiali'i transfer, injunctive relief is barred be-

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A: I've seen it.

Q: And are you familiar with a moratorium that [then-] Director Wilson refers to?

A: Yes.

Q: And could you-could you tell us what that was about.

A: I guess shortly after we got there Michael decided that given the controversy over the sale of ceded lands that we would try not to sell but that if we wanted to move forward some transaction, we would. So, if there were basically sales were [sic] already approved by the board before we got there we couldn't. If properties was [sic] necessary because of some ongoing project, you now, we take it case by case. But *that generally that we wouldn't encourage the sale of the public lands.*

(Emphasis added.)

(Footnotes omitted.)

> cause it would 'turn back the clock and examine actions already taken by the State.'

The defendants assert that the trial court correctly determined that the plaintiffs' claims were barred by the doctrine of ripeness because the plaintiffs "preemptive[ly] challenge" the "sale of any and all [c]eded [l]ands." The defendants reason that "any particular sale of [c]eded [l]ands could present a conflict of interest or a breach of fiduciary duty (for example, if the State proposed to sell for less than fair market value to a state official for his or her private benefit)[,]" but that "this [c]ourt should decline to speculate as to such future events." Additionally, the defendants argue that "the trial court rightly declined to enter relief based on the assumption that the coordinate and co-equal executive and legislative branches will engage in bad faith and wrongful conduct in the future. This [c]ourt should also decline to do so."

We have stated that "ripeness is peculiarly a question of timing, and a ruling that an issue is not ripe ordinarily indicates the court has concluded a later decision may be more apt or that the matter is not yet appropriate for adjudication." *County of Kaua'i ex rel. Nakazawa v. Baptiste*, 115 Hawai'i 15, 36, 165 P.3d 916, 937 (2007) (internal quotation marks and citation omitted). Moreover, "prudential rules of judicial self-governance founded in concern about the proper—and properly limited—role of courts in a democratic society, [and] considerations flowing from our coequal and coexistent system of government, dictate that we accord those charged with drafting and administering our laws a reasonable opportunity to craft and enforce them in a manner that produces a lawful result." *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Hawai'i 465, 483, 78 P.3d 1, 19 (2003) (internal quotation marks,

original brackets, and citation omitted). The federal courts have applied the following test, which we believe is instructive, in determining whether a particular case is ripe:

> Because ripeness is peculiarly a question of timing, the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention. The ripeness inquiry has two prongs: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The fitness element requires that the issue be primarily legal, need no further factual development, and involve a final agency action. To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss.

Rice v. Cayetano, 941 F. Supp. 1529, 1538 (D. Haw. 1996) (citations and internal quotation marks omitted), rev'd on other grounds, 528 U.S. 495, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

With respect to the first prong of the federal test, the plaintiffs must show that the issue regarding their entitlement to injunctive relief is fit for judicial decision because the issue is "primarily legal, need[s] no further factual development and involve[s] a final agency action." *Id.* (internal quotation marks and citation omitted). Here, as the plaintiffs argue, the issue is fit for judicial resolution inasmuch as they are not seeking a determination whether the native Hawaiian people are entitled to ownership of the ceded lands; what they are seeking is a determination whether an injunction is ap-

propriate to allow for a resolution of their claims to the ceded lands without further diminishment of the trust res. There is no doubt that the issuance of an injunction involves a legal question. *See, e.g.*,HRCP Rule 65 (2007) (governing the issuance of injunctive relief); *Wahba, LLC v. USRP (Don), LLC*, 106 Hawai'i 466, 106 P.3d 1109 (2005) (describing injunctions and temporary restraining orders). Moreover, the record demonstrates that there is no need for further factual development inasmuch as the facts necessary to decide ripeness are currently before this court. With regard to the Leiali'i parcel, a final agency action (*i.e.*, the transfer of the parcel from DLNR to HFDC) has been taken, and, although "final agency action" with regard to the ceded lands in general has yet to be taken, the very nature of the plaintiffs' requested relief—that an injunction issue to protect the corpus of the public land trust until the reconciliation efforts contemplated by the Apology Resolution and related state legislation has been completed—dictates that a judicial decision regarding the issuance of such an injunction is appropriate. We, therefore, believe that the fitness element has been met.

With respect to the second prong of the federal test, *i.e.*, the hardship requirement, the plaintiffs must show "that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss." *Rice*, 941 F.Supp. at 1538 (internal quotation marks and citation omitted). Here, inasmuch as the Leiali'i parcel was transferred to the HFDC for purposes of developing a residential housing project, and, although the defendants have voluntarily discontinued development, there exists a real threat that, should the HFDC proceed with the housing development project, the parcel could be transferred by

the HFDC to third parties. Moreover, as indicated by the trial court, "the State has been following a self[-]imposed moratorium on the sales of additional ceded lands." Thus, by the same token, should the State decide to lift its own moratorium, there is a potential for the sale or transfer of additional ceded lands. Once the ceded lands are alienated from the public lands trust, they will be lost forever and will not be potentially available to satisfy the unrelinquished claims of native Hawaiians to the lands, as recognized and contemplated by the Apology Resolution and the related state legislation, discussed supra. Were this court to withhold consideration of the plaintiffs' request for injunctive relief, the State would be free to alienate the ceded lands from the public lands trust. And, in so doing, the resulting hardship to the plaintiffs would be obvious—the alienated lands would be lost forever—and, as discussed more fully *infra*, the loss of the land itself entails a much greater injury "than possible financial loss." Were we to determine that the plaintiffs' claim for injunctive relief was not ripe, they may be left without a remedy while the corpus of the public lands trust continues to diminish, a result surely not contemplated by the Apology Resolution and our own state legislative pronouncements in Acts 354 and 359.

Moreover, were this court to grant the plaintiffs' requested injunctive relief, it would not be overstepping "prudential rules of judicial self-governance," *Save Sunset Beach Coal.*, 102 Hawai'i at 483, 78 P.3d at 19 (original brackets omitted), because, as previously indicated, such a decision would not involve a determination whether the native Hawaiian people are entitled to ownership of the ceded lands; we need only address whether an injunction is appropriate to allow resolution of these claims without further diminishment of the

trust res. As such, any injunctive relief granted by this court would allow Congress and/or the state legislature a "reasonable opportunity to craft and enforce," *id.*, relevant laws consistent with the congressional and legislative calls for reconciliation and settlement of native Hawaiian claims.

Based on the foregoing discussion, we hold that the plaintiffs' claims—to the extent they seek injunctive relief—are ripe for adjudication and, accordingly, hold that the trial court erred in determining otherwise. Because the plaintiffs' remaining claims do not necessitate a distinction between the Leiali'i parcel and the ceded lands in general, the following discussion encompasses both the Leiali'i parcel and the ceded lands in general.

E. *Political Question*

"The political question doctrine, often considered the most amorphous aspect of justiciability, holds generally that certain matters are political in nature and thus inappropriate for judicial review." *Nishitani v. Baker*, 82 Hawai'i 281, 290, 921 P.2d 1182, 1191 (App. 1996) (citation omitted). In deciding whether the political question doctrine should be invoked, this court, in *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987), adopted the test recited by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962):

> Prominent on the surface of any case held to involve a political question is found[: (1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and

> manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Yamasaki, 69 Haw. at 170, 737 P.2d at 455 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. 691) (format altered). The presence of any one of these six factors renders a case nonjusticiable. *Id.* Moreover, the political question doctrine is "essentially a function of the separation of powers." *Id.* (citation omitted).

The trial court concluded that all the plaintiffs' claims were barred by the doctrine of political question. Specifically, the trial court ruled that this court has held that "the issue of whether the Territory of Hawai'i received good title to the ceded lands is a nonjusticiable political question," and, as such, it was precluded from "consider[ing] the merits of [p]laintiffs' claim that the sale of ceded lands is prohibited due to a cloud on the States's title due to the illegality of the overthrow."[24]

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[24] As previously indicated, the trial court, nevertheless, went on to determine that the State had the legal authority to sell ceded lands.

In challenging the trial court's ruling, the OHA plaintiffs assert that their claims do not present a non-justiciable political question because, in their view, they are "not seeking a judicial resolution of the underlying claim for a return of lands," but, instead, are asking only that this court "protect the trust assets while the dispute is being resolved by the political branches." In other words, the plaintiffs specifically assert that they are *not* "ask[ing] this [c]ourt to resolve any claim [to the ceded lands], but only to protect the trust assets that are in dispute by issuing an injunction barring the sale or transfer of the [ceded] lands. [The plaintiffs] are seeking only to have this [c]ourt protect the [c]eded [l]ands from dissipation until the political branches can reach a just solution to this dispute." In fact, the OHA plaintiffs admit that "the ultimate resolution of the [n]ative Hawaiian claims must be through the political processes, and it is actively engaged in these processes. But this struggle for justice *will be futile if the assets in disputes* [*i.e., the ceded lands*] *no longer exist when a solution is found.*" Additionally, the individual plaintiffs point out that their claims are not barred by the political question doctrine because the standards that apply to trusts provide this court with "judicially discoverable and manageable standards for resolving this issue."

The defendants maintain that the trial court correctly determined that the plaintiffs' claims presented non-justiciable political questions inasmuch as, "[f]or nearly 100 years[,] the Hawai'i Supreme Court has foreclosed judicial inquiry into the State's title to the [c]eded [l]ands because the issue presents a political question, inappropriate for decision by the judicial branch." Moreover, the defendants argue that there are four specific reasons why the plaintiffs' claims pre-

sent a non-justiciable political question: (1) "the case involves examination of questions for which there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' "; (2) "there is a 'lack of judicially discoverable and manageable standards for resolving' this case"; (3) "the case is impossible to decide 'without an initial policy determination of a kind clearly for nonjudicial discretion' "; and (4) "[this c]ourt cannot undertake an 'independent resolution without expressing lack of the respect due coordinate branches of government.' "

The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved. The important distinction here is that this court is *not* being asked to decide whether native Hawaiians are *entitled* to the ceded lands. As even the plaintiffs recognize, the "ultimate resolution of the [n]ative Hawaiian claims must be through the political process." We believe, as discussed *supra*, that the Apology Resolution—which is at the heart of the plaintiffs' claim—and the related state legislation, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved. Accordingly, we hold that the Apology Resolution and the related state legislation provide the standards needed for determining whether the *issuance on an injunction* is proper. In other words, the question before this court—whether an injunction should issue—presents a type of dispute that is tradi-

tionally resolved in the judiciary and, therefore, does not present a non-justiciable political question.

Moreover, we believe that the defendants' arguments with regard to four of the six Baker factors, previously enumerated, are without merit. First, this case does not involve "an examination of questions for which there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' " inasmuch as the plaintiffs only request an injunction pending the resolution of the plaintiffs' underlying claims in the legislative process, and this court need not encroach on any issues that have been constitutionally committed to a coordinate political department in order to determine if injunctive relief is appropriate. Second, there are, as discussed *infra*, judicially manageable standards for issuing an injunction. Third, this court need not make " 'an initial policy determination of a kind clearly for nonjudicial discretion' " in order to determine whether the plaintiffs' requested injunction is appropriate inasmuch as this court need only look to the Apology Resolution and, additionally, the related state legislation, as discussed *supra*. Lastly, were this court to grant the plaintiffs' requested injunctive relief, this court would not be "undertak[ing] an 'independent resolution without expressing lack of the respect due coordinate branches of government' " because, as previously indicated, the question whether an injunction is warranted in this case is the kind of question traditionally reserved for the courts.

Therefore, we agree with the plaintiffs that "the [trial c]ourt's analysis and citations miss[ed] the mark because [the plaintiffs are] not seeking a judicial resolution of the underlying claim for a return of lands, but [are] rather asking the judiciary to protect the trust assets while the dispute is being resolved by the politi-

cal branches. This modest goal is well within the domain of the judiciary[.]" Accordingly, we hold the trial court incorrectly determined that the claims presented by the plaintiffs in this case—to the extent they seek injunctive relief—were barred by the political question doctrine.

F. *The Plaintiffs' Requested Injunction*

As previously stated, the trial court—although not required—concluded that the defendants had the explicit authority under the Admissions Act and the Hawai'i State Constitution to alienate the ceded lands. Having so concluded, the trial court summarily denied the plaintiffs' claim for injunctive relief, reasoning only that,

> for injunctive relief to issue on [the p]laintiffs' claim seeking a permanent injunction based on the allegation that sales of ceded lands constitute a breach of trust, [the p]laintiffs must first prevail on the merits of the underlying cause of action. The [trial] court only reaches the issue of "balance of irreparable harm" and "public interest in support" if the plaintiffs prevail on the merits.

The plaintiffs assert that the trial court erred in denying their request for injunctive relief because it was not necessary to first "resolve whether the State received 'good title' to grant injunctive relief in this case." As previously discussed, the plaintiffs' request for injunctive relief is grounded in their view that the "recognition in [the Apology Resolution and Acts 354 and 359] of the illegality of the transfer of [the ceded] lands and the ongoing reconciliation and negotiation process dramatically reinforces the State's fiduciary

obligation to protect the corpus of the [p]ublic [l]and [t]rust until an appropriate settlement is reached." Additionally, the plaintiffs maintain that injunctive relief is critical to their ability to "protect the status quo before these [c]eded lands are lost and the [n]ative Hawaiian people suffer irreparable harm." The OHA plaintiffs cite to a number of international situations that they claim "illustrate[ ] that a moratorium on governmental action is appropriate to protect the rights of the natives while efforts to reach a proper settlement are underway."[25] The individual plaintiffs suggest that this court should look to general trust law for guidance in determining whether to issue an injunction and that trust law mandates that an injunction be issued inasmuch as any sale or transfer of the illegally obtained ceded lands by the State would constitute a breach of its fiduciary duties to preserve the assets of the public lands trust until a settlement is reached.

The defendants maintain that the trial court correctly denied the plaintiffs' request for injunctive relief because the plaintiffs have not shown they can prevail on the merits. Specifically, the defendants argue that "the State has the undoubted and explicit power to sell [c]eded [l]ands pursuant to the terms of the Admission Act and pursuant to [s]tate law.[26] [The p]laintiffs have

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[25] Although we recognize that international law and situations cited by the plaintiffs provide support for their requested injunction, we do not believe it is necessary to engage in a discussion of these issues inasmuch as our holding is grounded in Hawai'i and federal law.

[26] The defendants assert that there are five "reasons or bases" for the State's "unchallenged power to sell" the ceded lands: (1) "enabling acts generally and historically have afforded the power to sell to new states"; (2) "the Admission Act specifically

completely failed to show any basis for deviating from the terms of the trust or for finding that applicable [s]tate laws are unconstitutional or void." The defendants also argue that "the plaintiffs in our case specifically disclaim title to the [c]eded [l]ands. There simply are no 'merits' on which plaintiffs did or could prevail." The defendants further assert that "the unprecedented nature of the plaintiffs' request is highlighted by their use of the term 'moratorium.' It is not even clear whether this term is supposed to mean something different from 'injunction,' and if so, what."

The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction. *Life of the Land v. Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978); *see also Morgan v. Planning Dep't, County of Kauai*, 104 Hawai'i 173, 86 P.3d 982 (2004). However, as observed by the Intermediate Court of Appeals in *Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw.App. 272, 630 P.2d 646 (1981), "[t]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits." *Id.* at 276, 630 P.2d at 650 (citations omitted). As pointed out by the parties and the trial court, "[n]o reported Hawai'i case discusses the requirements for entry of a permanent injunction."

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grants the power to sell"; (3) "the Hawai'i Constitution confirms the power to sell"; (4) "state statutes embody the power to sell"; and (5) "the Hawai'i Supreme Court has previously held that the State has power to sell."

However, we agree with the trial court that "it is generally held that '[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.' "[27] Accordingly, we believe that the appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction.

Thus, where a permanent injunction is sought from an appellate court, the first element of the test is necessarily concerned with whether the plaintiffs have prevailed on the merits of the appeal. *See Indian Motorcycle Assocs.*, 66 F.3d at 1249. Having held that the Apology Resolution and related state legislation give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved, we believe the plaintiffs, as a matter of law, have succeeded on the

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[27] *See, e.g., Indian Motorcycle Assocs. III Ltd. P'ship v. Massachusetts Housing Fin. Agency*, 66 F.3d 1246, 1249 (1st Cir. 1995):

> Four principal factors govern the appropriateness of permanent injunctive relief: (1) whether the plaintiff has prevailed on the merits; (2) whether the plaintiff will suffer irreparable injury absent injunctive relief; (3) whether the harm to the plaintiff outweighs any harm threatened by the injunction; and (4) whether the public interest will be adversely affected by the injunction.

(Internal quotations marks and citation omitted.)

merits of their claim inasmuch as any future transfer of ceded lands by the State would be a breach of the State's fiduciary duty to preserve the trust res.

Specifically, the language of the Apology Resolution itself supports the issuance of an injunction. As previously discussed, we believe, based on a plain reading of the Apology Resolution, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations. Equally clear is Congress's "express[ed] ... commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, *in order to provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphasis added). Accordingly, the Apology Resolution dictates that the ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people. Without an injunction, the ceded lands are at risk of being alienated and, as previously stated, once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians and will, as discussed more fully *infra*, undoubtedly have a negative impact on the contemplated reconciliation efforts.

The plaintiffs' argument that an injunction is necessary to preserve the status quo pending the resolution of the native Hawaiians' claims to the ceded lands is further supported by the Justice and Interior Departments' report, entitled "From Mauka to Makai: The River of Justice Must Flow Freely." As previously

stated, the report states: "As [a] matter of justice and equity, this report recommends that [n]ative Hawaiian people should have self-determination over their own affairs within the framework of [f]ederal law, as do Native American tribes." (Format altered.) (Emphases added.) Moreover, the Departments asserted that, "[t]o safeguard and enhance [n]ative Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify [n]ative Hawaiians' political status and to create a framework for recognizing a government relationship with a representative [n]ative Hawaiian governing body."

More importantly, the state legislature itself has announced that future reconciliation between the State and native Hawaiians will occur. The Hawai'i legislature, in Acts 359 and 329, discussed *supra*, recognized that "the indigenous people of Hawai'i were denied ... their lands," 1993 Haw. Sess. L. Act 359, § 1(9) at 1010 (creating a Hawaiian Sovereignty Advisory Commission), and contemplated further action by the legislature to reach a "lasting reconciliation so desired by all people of Hawai'i." 1997 Haw. Sess. L. Act 329, § 1 at 956. Although Act 359, which created the Hawaiian Sovereignty Advisory Commission, did not specifically address the issue of native Hawaiians' title to ceded lands, the stated purpose of the Act was to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." 1993 Haw. Sess. L. Act 359, § 2 at 1010. As previously stated, Act 354 recognized that "[m]any native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-

government as do other native American peoples." 1993 Haw. Sess. L. Act 354, § 1 at 1000. Moreover, the legislature "acknowledged that the actions by the United States were illegal and immoral, and pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." *Id.* Additionally, in Act 329, the legislature indicated that it was moving "*toward a comprehensive, just, and lasting resolution*" regarding native Hawaiian claims to the ceded lands. 1997 Haw. Sess. Law. Act 329, § 1 at 956 (emphasis added).

The governor, herself, has indicated her commitment-and, by association, that of the executive branch-to settling the native Hawaiians' claims to the ceded lands. On January 21, 2003, in her "State of the State Address," Governor Lingle stated, "Here at home in Hawai'i[,] I will continue to work with you [*i.e.*, the members of the legislature] and with the Hawaiian community to resolve the ceded lands issue once and for all." Linda Lingle, Governor, State of Hawai'i, *State of the State Address: An Outline of the Governor's Agenda* (Jan. 21, 2003).

Also, as previously noted, testimony was adduced at trial that the State has been following a self-imposed moratorium since 1994 on the sales of ceded lands until a resolution of the present lawsuit. Such a self-imposed moratorium leads to an inference that questions regarding the title to the ceded lands exist and, additionally, that the State is apparently able to comply with its duties as public lands trustee without having to alienate the ceded lands.

In sum, all of the aforementioned pronouncements indicate that the issue of native Hawaiian title to the

ceded lands will be addressed through the political process. In this case, Congress, the Hawai'i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever. For present purposes, this court need not speculate as to what a future settlement might entail-i.e., whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement. In other words, the aforementioned pronouncements as they relate and impact the plaintiffs' claim for injunctive relief clearly support the plaintiffs' position that the State has a fiduciary duty as trustee to protect the ceded lands pending a resolution of native Hawaiian claims. As such, we believe that the plaintiffs have met the first prong of the three-part test for issuance of a permanent injunction, *i.e.*, prevailing on the merits of their claim.

The second prong of the test for an injunction is whether "the balance of irreparable damage favor[s] the issuance of a temporary injunction." *Life of the Land*, 59 Haw. at 158, 577 P.2d at 1118. Obviously, without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts contemplated by the Apology Resolution, Acts 354, 359, and 329, and Governor Lingle. Although an argument could be made that monetary reparations would be the logical remedy

for such loss, we are keenly aware—as was Congress—that "the health and well-being of the [n]ative Hawaiian people is intrinsically tied to *their deep feelings and attachment to the land*[.]" Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphasis added). Indeed, as more eloquently stated by the trial court:

> The [n]ative Hawaiian [p]eople continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices and institutions. "The health and well-being of the [n]ative [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land." [(Citing in a footnote to the Apology Resolution.)] *'Aina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople-to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. 'Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable.* The natural elements-land, air, water, ocean-are interconnected and interdependent. *To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.* The 'aina is part of their 'ohana, and they care for it as they do for other members of their families. *For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.*

(Footnotes omitted.) (Emphases added.)

Moreover, testimony adduced at trial further supports and underscores the importance of the land to native Hawaiians and to their continued "cultural identity

... spiritual and traditional beliefs, customs, practices, language, and social institutions," Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, as well as the historical and cultural reasons therefor. For example, David H. Getches, a professor at the University of Colorado School of Law, was called to testify as the plaintiffs' expert. Getches testified that he was a member of the editorial board for the 1982 edition of the *Felix Cowen's Handbook of Federal Indian Law*, considered "one of the leading treatises on Indian law," and authored the chapter on native Hawaiians. He was qualified as an expert in the field of "natural resources law," without objection. With regard to the ceded lands, Getches testified:

> Q [By plaintiffs' counsel] You have said that preventing ceded lands from being transferred would keep the claims situation from becoming more complicated, preserve flexibility, and be consistent with the intent of Congress and the state legislature. Based on your knowledge of the history of native Hawaiian claims[,] what is so special about these lands?
>
> A [By Getches] I think that *what is special about these claims is that this is land that has a pedigree tracing back to a disposition of the Hawaiian people at the time of the overthrow.* This is highly unusual to be able to trace this much land still in public ownership back to the time of dispossession, the very root of these claims.
>
> Secondly, this is land which my understanding is has been traditionally used in some places by native people for traditional purposes.

Third, *it is land that was granted to the State only on specific conditions that demand fiduciary responsibility.* So there is certainly something special about those lands when it comes to their use and disposition in the future.

Further, I think that it is notable that the objection to the use of these lands is coming now by the only legally constituted voice for the present day successors to the people who were dispossessed. *This is a remarkable claim in this case.* And I think those reasons all support the conclusion that there is something special about these lands.

....

Q Can a political entity have governance without having any territory?

A It is very difficult to have sovereignty without land. There are some exceptional examples. Israelites before there was an Israel had a notion of governance. It is very difficult for a government to operate without territorial boundaries.

Q Is governance important? Is land important to native people for cultural survival as well?

A Yes. As I indicated, there are traditional uses of land, and in particular the land you were asking me about, that make it especially important. Land generally for native people—I am now speaking based on my knowledge of Indian tribes throughout the United States and the ones I have worked with—*land is generally extremely important as the very root of their culture. It is the homeland. It provides*

> *the basis for self determination, self expression. It is a source of identity. Who we are. As a people.* As people have said it to me. *It is a connection,* as well, *to one's cultural roots,* going back to the ancestors that can be felt and who were known and the ancestors who were unknown and exist only in the spiritual world. That connects present day communities with one another, within those cultural roots. So *the land is symbolic* for that, whether it is for burial places or just the feeling that this is the place of importance.
>
> Finally, *it is important for spiritual fulfillment, something we as non native people don't feel, is the importance of place in a spiritual way.* I love certain places that I go and some that I own. But it is really quite different, having the land, water, nature connection that native people have. I don't like generalizations about native groups. And what is common among them. *This is the only generalization I have found in over thirty-some years that holds up, that is, that there is a special spiritual connection with land among all native groups that I know.*

(Emphases added.)

Olive Kanahele was called as a witness by the plaintiffs. She holds a bachelor of arts degree in Hawaiian Studies and is a "kumu hula" or dance teacher. In addition to teaching dance, *i.e.*, the hula, Kanahele described learning about ancient Hawaiian chants and testified specifically regarding chants that tell the story of Pele and Hiiaka, deities of the life cycle. According to Kanahele,

Pele comes and she erupts and her lava goes all over the lands and also extends land. And Hiiaka comes along and her function as the egg child ... is to allow things to grow on the land. And so she's the healer of the family and she heals the lands and things begin to grow. And as the things begin to grow, then it becomes suitable for ... humans ... to live on.

When asked about "the land," Kanahele testified:

The land itself ... is the deity, Pele. The land itself was made from fire and it comes from out of the earth. And, you know, I can give you a little geneaology [sic] of the Pele family. The Pele family comes from-the mythological geneaology [sic] of the Pele family is that the mother is Haumea, she is the. Mother Earth, she is the earth and all of these children are born from different parts of her.

....

Pele ... is born from the natural channel of a female, she comes from the womb. And so ... her responsibility is to go back into the womb of the mother and-and bring out all of these things that we call land, that we call magma and lava and eventually will become land.

One of the-one of the most amazing literary work that we have is the kumulipo.... The kumulipo spans generations of people.... And the first era of the kumulipo, the very first line of the kumulipo talks about the making of the earth....

....

> ... And why does it have to be earth, you ask me?
>
> ....
>
> It has to be earth because as man we need-we need land to live on. That is-that is our foundation. *And for the native Hawaiian, more than the family, land is their foundation. Land is their identity.*

(Emphases added.) Based on the foregoing, we believe the second prong of the test for an injunction, *i.e.*, irreparable damage, has been met. *Life of the Land*, 59 Haw. at 158, 577 P.2d at 1118.

The last prong of the test for an injunction is whether "the public interest supports granting an injunction." *Id.* Here, we need look no further than the legislative pronouncement contained in Act 329, declaring that a "lasting reconciliation [is] desired by all people of Hawai'i," 1997 Haw. Sess. L. Act. 329 § 1 at 956, to conclude that the public interest supports granting an injunction.

We firmly believe that, given the "crucial importance [of the 'aina or land to] the [n]ative Hawaiian people and their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being," any further diminishment of the ceded lands (the 'aina) from the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State.

It is well-settled that a "[s]ettlement is an agreement to terminate, by means of mutual concessions, a claim that is disputed in good faith ... and is designed to prevent or put at end to litigation." *Rearden Family*

Trust v. Wisenbaker, 101 Hawai'i 237, 251, 65 P.3d 1029, 1043 (2003) (internal quotation marks, original brackets, citation, and footnote omitted). The continued diminishment of the public lands trust means that any land sold or transferred to third parties will be lost and, thus, unavailable for settlement purposes. As such, native Hawaiians would be placed in an unfair and disadvantaged position inasmuch as they may, ultimately, be forced to accept less-than-desirable settlement terms and make concessions that they would not have otherwise made had certain ceded lands, for example, been kept in the public lands trust. Moreover, the State, acting as both the trustee of the land (with the power to alienate it) and a major participant in the negotiation process, would be in a more advantageous position and have greater bargaining power. In our view, enjoining the defendants from selling or otherwise transferring to third parties any ceded lands from the public land trust until the claims of the native Hawaiians to those lands are resolved and, thus, preserving the status quo and the trust res, would help in leveling the playing field during the pendency of settlement negotiations and reconciliation process contemplated by the Apology Resolution and related state legislation discussed supra. *Cf. Hosp. Klean of Tex., Inc. v. United States*, 65 Fed. Cl. 618 (2005) (finding lost opportunity to compete for contract on level playing field sufficient to constitute irreparable harm for purpose of issuing temporary restraining order); *Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. 849, 867 (N.D. Ill. 1996) (injunction issued to level the playing field of the parties).

Finally, as indicated by the plaintiffs, their request for an injunction is further supported by the United States Supreme Court's decision in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 39 S. Ct. 185, 63 L. Ed. 504

(1919). In *Lane*, the plaintiff, "an Indian town," brought a claim seeking to enjoin certain governmental officials from "offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States." 249 U.S. at 111, 39 S. Ct. 185. The plaintiffs alleged two grounds for their suit: (1) "that under the laws of Spain and Mexico it had, when that region was acquired by the United States, and under the provisions of the treaty it now has, a complete and perfect title to the lands in question"; and (2) "that in disregard of its title the defendants are threatening and proceeding to offer, list and dispose of these lands as public lands of the United States." *Id.* The court "of first instance" granted the defendants' motion to dismiss. Id. On appeal, the Court of Appeals of the District of Columbia held that the plaintiff's claims entitled it to relief and granted its requested permanent injunction. *Id.* The defendants challenged the Court of Appeals' decision. Although, ultimately determining that the Court of Appeals should not have granted the permanent injunction because that proceeding did not afford the defendants the opportunity to answer the merits, the Court observed:

> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly[,] it would not justify the defendants in treating the lands of these Indians—to

> which, according to the bill, they have a complete and perfect title, as public lands of the United States and disposing of the same under the public land laws. *That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers* in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court[.]

Lane, 249 U.S. at 113, 39 S. Ct. 185 (emphasis added) (footnote omitted). The Court held that

> "the decrees of both courts below should be reversed and the case remanded to the court of first instance, with direction to overrule the motion to dismiss, to afford the defendants an opportunity to answer the bill, [and] *to grant an order restraining them from in any wise offering, listing or disposing of any of the lands in question pending the final decree* [ ]."

Id. at 114, 39 S. Ct. 185 (emphasis added).

As the defendants in this case point out, the facts in the instant case differ from those in *Lane* inasmuch the plaintiffs do not assert that they have "complete and perfect title" and do not "seek judicial resolution of any controversy," as well as the fact that "*Lane* considered only the executive branch's power to deal with Indian land." Nevertheless, *Lane* is instructive to the extent that it demonstrates the Court's rationale for ordering that injunctive relief be granted pending a final resolu-

tion of claims. The fact that *Lane* involved a judicial resolution for a controversy versus a legislative resolution as in the instant case is, in our view, a distinction without a difference.

Based on the foregoing discussion, we conclude that the plaintiffs have established that injunctive relief is proper pending final resolution of native Hawaiian claims through the political process. Accordingly, we hold that the trial court erred in denying the plaintiffs' request for injunctive relief.

G. *The Plaintiffs' Remaining Contentions*

In light of the above discussion, we need not address the OHA plaintiffs' remaining contentions regarding declaratory relief or certain evidentiary rulings made by the trial court.

IV. *CONCLUSION*

Based on the foregoing, we hold that: (1) the Apology Resolution and related state legislation, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved; (2) the trial court correctly determined that this court's unpublished decision in *Trustees of the Office of Hawaiian Affairs v. Board of Land and Natural Resources*, No. 19774, 87 Hawai'i 471, 959 P.2d 841 (Haw. Mar. 12, 1998) (mem.), did not collaterally estop the plaintiffs' claims in this case inasmuch as the elements of collateral estoppel, *see Kealhole Def. Coal., Inc. v. Bd. of Land & Natural Res.*, 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006), are not present; (3) the plaintiffs' claim for injunctive relief with regard to the Leiali'i parcel is not barred by sovereign immunity based on our conclusion that the $31 million

expenditure on infrastructure for the Leiali'i parcel had only an ancillary effect-albeit a substantial one-on the state treasury, *see Kaho'ohanohano v. State*, 114 Hawai'i 302, 337, 162 P.3d 696, 731 (2007); (4) inasmuch as the Apology Resolution and related state legislation give rise to a fiduciary duty by the State, as trustee, to preserve the corpus of the public lands trust until such time as the unrelinquished claims of the native Hawaiians have been resolved, the trial court's conclusion that OHA's actions between 1987 and 1994 constituted a waiver of the plaintiffs' claims was clearly erroneous and, therefore, the plaintiffs did not waive their claim for injunctive relief with regard to the Leiali'i parcel; (5) the plaintiffs were not estopped from challenging the transfer of the Leiali'i'i parcel based on their pre-1993 actions because it was not until the Apology Resolution was signed into law on November 23, 1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose; (6) inasmuch as the plaintiffs' requested relief is clearly prospective in nature, the plaintiffs' claims with regard to the sale or transfer of the ceded lands in general are not barred by sovereign immunity; (7) the question whether an injunction is appropriate to allow resolution of the plaintiffs' unrelinquished claims without further diminishment of the trust res is ripe for adjudication; (8) the question whether an injunction should issue presents a type of dispute that is traditionally resolved by the courts and, therefore, does not present a non-justiciable political question; (9) the appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (a) whether the plaintiff has prevailed on the merits; (b) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (c) whether the

public interest supports granting such an injunction; and (10) the plaintiffs have established that injunctive relief is proper pending final resolution of native Hawaiian claims through the political process.

Accordingly, we vacate the trial court's January 31, 2003 judgment and remand this case to the circuit court with instructions to issue an order granting the plaintiffs' request for an injunction against the defendants from selling or otherwise transferring to third parties (1) the Leiali'i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved.

APPENDIX B

SUPREME COURT OF HAWAI'I

No. 25570

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,
Plaintiffs-Appellants,

v.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, ET AL.,
Defendants-Appellees.

[STAMP: FILED 2008 MAR 24 AM 11:59]

JUDGMENT ON APPEAL
(By Moon, C.J., for the court[1])

Pursuant to the opinion of the Supreme Court of the State of Hawaii entered on January 31, 2008, the judgment of the Circuit Court of the First Circuit, filed January 31, 2003, is vacated and this case is remanded to the circuit court with instructions to issue an order granting the plaintiffs-appellants' request for an injunction against the defendants-appellees from selling or otherwise transferring to third parties (1) the Leiali'i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved.

[1] Court: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.; Circuit Judge Chan, in place of Duffy, J., recused.

DATED Honolulu, Hawaii, March 24, 2008

FOR THE COURT:

/s/

Chief Justice

APPENDIX C

Pub. L. No 103-150, 107 Stat. 1510 (1993)

Joint Resolution to Acknowledge
the 100th Anniversary of the January 17, 1893
Overthrow of the Kingdom of Hawaii

Joint Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.

Whereas, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;

Whereas a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

Whereas the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Missions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850;

Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;

Whereas, in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;

Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendents of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;

Whereas the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;

Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement yielding her authority to the United States Government rather than to the Provisional Government:

"I Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.

"That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.

"Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.".

Done at Honolulu this 17th day of January, A.D. 1893.;

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms;

Whereas, on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

Whereas the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government;

Whereas, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission;

Whereas, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;

Whereas President Cleveland further concluded that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy;

Whereas the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States;

Whereas the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred to in this Resolution as the

"Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy;

Whereas the Committee and its chairman, Senator John Morgan, conducted hearings in Washington, D.C., from December 27, 1893, through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii;

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation;

Whereas, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was forced by representatives of the Republic of Hawaii to officially abdicate her throne;

Whereas, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland;

Whereas, on July 7, 1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or

compensation to the Native Hawaiian people of Hawaii or their sovereign government;

Whereas the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;

Whereas the Newlands Resolution also specified that treaties existing between Hawaii and foreign nations were to immediately cease and be replaced by United States treaties with such nations;

Whereas the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government;

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

Whereas, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States;

Whereas, on August 21, 1959, Hawaii became the 50th State of the United States;

Whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population

and to the health and well-being of the Hawaiian people;

Whereas the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own *1513 spiritual and traditional beliefs, customs, practices, language, and social institutions;

Whereas, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the Native Hawaiians in the Hawaiian and the American societies;

Whereas the Eighteenth General Synod of the United Church of Christ in recognition of the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the Native Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the Native Hawaiians; and

Whereas it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ACKNOWLEDGMENT AND APOLOGY.

The Congress—

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

SEC. 2. DEFINITIONS.

As used in this Joint Resolution, the term "Native Hawaiian" means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and

exercised sovereignty in the area that now constitutes the State of Hawaii.

SEC. 3. DISCLAIMER.

Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

Approved November 23, 1993.

APPENDIX D

Pub. L. No. 86-3, 73 Stat. 4 (1959)

AN ACT

To provide for the admission of the State of Hawaii into the Union.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefore", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

SEC. 2. The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall

not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

SEC. 3. The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

SEC. 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: *Provided*, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except

with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

SEC. 5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permis-

sion, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency havinj control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a

breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawaii into the Union.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty-third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.

SEC. 6. As soon as possible after the enactment of this Act, it shall be the duty of the President of the United States to certify such fact to the Governor of

the Territory of Hawaii. Thereupon the Governor of the Territory shall, within thirty days after receipt of the official notification of such approval, issue his proclamation for the elections, as hereinafter provided, for officers of all State elective offices provided for by the constitution of the proposed State of Hawaii, and for two Senators and one Representative in Congress. In the first election of Senators from said State the two senatorial offices shall be separately identified and designated, and no person may be a candidate for both offices. No identification or designation of either of the two senatorial offices, however, shall refer to or be taken to refer to the term of that office, nor shall any such identification or designation in any way impair the privilege of the Senate to determine the class to which each of the Senators elected shall be assigned.

SEC. 7. (a) The proclamation of the Governor of Hawaii required by section 6 shall provide for the holding of a primary election and a general election and at such elections the officers required to be elected as provided in section 6 shall be chosen by the people. Such elections shall be held, and the qualifications of voters thereat shall be, as prescribed by the constitution of the proposed State of Hawaii for the election of members of the proposed State legislature. The returns thereof shall be made and certified in such manner as the constitution of the proposed State of Hawaii may prescribe. The Governor of Hawaii shall certify the results of said elections, as so ascertained, to the President of the United States.

(b) At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors

qualified to vote in said election, for adoption or rejection, the following propositions:

"(1) Shall Hawaii immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved (Date of approval of this Act) and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved (Date of approval of this Act) reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

In the event the foregoing propositions are adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Hawaii, ratified by the people at the election held on November 7, 1950, shall be deemed amended as follows: Section 1 of article XIII of said proposed constitution shall be deemed amended so as to contain the language of section 2 of this Act in lieu of any other language; article XI shall be deemed to include the provisions of section 4 of this Act; and section 8 of article XIV shall be deemed amended so as to contain the language of the third proposition above stated in lieu of any other language, and section 10 of article XVI shall be deemed amended by inserting the words "at which officers for all state elective offices provided for by this constitution and two Senators and one Representative in Congress shall be nominated and

elected" in lieu of the words "at which officers for all state elective offices provided for by this constitution shall be nominated and elected; but the officers so to be elected shall in any event include two Senators and two Representatives to the Congress, and unless and until otherwise required by law, said Representatives shall be elected at large".

In the event the foregoing propositions are not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall cease to be effective.

The Governor of Hawaii is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast on said propositions shall be made by the election officers directly to the Secretary of Hawaii, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

(c) If the President shall find that the propositions set forth in the preceding subsection have been duly adopted by the people of Hawaii, the President, upon certification of the returns of the election of the officers required to be elected as provided in section 6 of this Act, shall thereupon issue his proclamation announcing the results of said election as so ascertained. Upon the issuance of said proclamation by the President, the State of Hawaii shall be deemed admitted into the Union as provided in section 1 of this Act.

Until the said State is so admitted into the Union, the persons holding legislative, executive, and judicial office in, under, or by authority of the government of said Territory and the Delegate in Congress thereof,

shall continue to discharge the duties of their respective offices. Upon the issuance of said proclamation by the President of the United States and the admission of the State of Hawaii into the Union, the officers elected at said election, and qualified under the provisions of the constitution and laws of said State, shall proceed to exercise all the functions pertaining to their offices in, under, or by authority of the government of said State, and officers not required to be elected at said initial election shall be selected or continued in office as provided by the constitution and laws of said State. The Governor of said State shall certify the election of the Senators and Representative in the manner required by law, and the said Senators and Representative shall be entitled to be admitted to seats in Congress and to,all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

SEC. 8. The State of Hawaii upon its admission into the Union shall be entitled to one Representative until the taking effect of the next reapportionment, arid such Representative shall be in addition to the membership of the House of Representatives as now prescribed by law: Provided, That such temporary increase in the membership shall not operate to either increase or decrease the permanent membership of the House of Representatives as prescribed in the Act of August 8, 1911 (37 Stat. 13), nor shall such temporary increase affect the basis of apportionment established by the Act of November 15, 1941 (55 Stat. 761; 2 U.S.C., sec. 2a), for the Eighty-third Congress and each Congress thereafter.

SEC. 9. Effective upon the admission of the State of Hawaii into the Union—

(a) the United States District Court for the District of Hawaii established by and existing under title 28 of the United States Code shall thenceforth be a court of the United States with judicial power derived from article III, section 1, of the Constitution of the United States: Provided, however, That the terms of office of the district judges for the district of Hawaii then in office shall terminate upon the effective date of this section and the President, pursuant to sections 133 and 134 of title 28, United States Code, as amended by this Act, shall appoint, by and with the advice and consent of the Senate, two district judges for the said district who shall hold office during good behavior;

(b) the last paragraph of section 133 of title 28, United States Code, is repealed; and

(c) subsection (a) of section 134 of title 28, United States Code, is amended by striking out the words "Hawaii and". The second sentence of the same section is amended by striking out the words "Hawaii and", "six and", and "respectively".

SEC. 10. Effective upon the admission of the State of Hawaii into the Union the second paragraph of section 451 of title 28, United States Code, is amended by striking out the words "including the district courts of the United States for the districts of Hawaii and Puerto Rico," and inserting in lieu thereof the words "including the United States District for the District of Puerto Rico,".

SEC. 11. Effective upon the admission of the State of Hawaii into the Union—

(a) the last paragraph of section 501 of title 28, United States Code, is repealed;

(b) the first sentence of subsection (a) of section 504 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii, where the term shall be six years";

(c) the first sentence of subsection (c) of section 541 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii where the term shall be six years"; and

(d) subsection (d) of section 541 of title 28, United States Code, is repealed.

SEC. 12. No writ, action, indictment, cause, or proceeding pending in any court of the Territory of Hawaii or in the United States District Court for the District of Hawaii shall abate by reason of the admission of said State into the Union, but the same shall be transferred to and proceeded with in such appropriate State courts as shall be established under the constitution of said State, or shall continue in the United States District Court for the District of Hawaii, as the nature of the case may require. And no writ, action, indictment, cause or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. And the appropriate State courts shall be the successors of the courts of the Territory as to alll cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein, and all the files, records, indictments, and proceedings relating to any such writ, action, indictment, cause or proceeding shall be transferred to

such appropriate State courts and the same shall be proceeded with therein in due course of law.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no writ, action, indictment or proceeding shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Hawaii in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said State courts had been established prior to the accrual of such causes of action or the commission of such offenses. The admission of said State shall effect no change in the substantive or criminal law governing such causes of action and criminal offenses which shall have arisen or been committed; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Hawaii.

SEC. 13. Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State

shall be to the United States District Court for the District of Hawaii or a court of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the State of Hawaii as successor to the Supreme Court of the Territory of Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Apueals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union.

SEC. 14. Effective upon the admission of the State of Hawaii into the Union—

(a) title 28, United States Code, section 1252, is amended by striking out "Hawaii and" from the clause relating to courts of record ;

(b) title 28, United States Code, section 1293, is amended by striking out the words "First and Ninth Circuits" and by inserting in lieu thereof "First Circuit", and by striking out the words, "supreme courts of Puerto Rico and Hawaii, respectively" and inserting in lieu thereof "supreme court of Puerto Rico";

(c) title 28, United States Code, section 1294, as amended, is further amended by striking out paragraph (4) thereof and by renumbering paragraphs (5) and (6) accordingly;

(d) the first paragraph of section 373 of title 28, United States Code, as amended, is further amended by striking out the words "United States

District Courts for the districts of Hawaii or Puerto Rico," and inserting in lieu thereof the words "United States District Court for the District of Puerto Rico,"; and by striking out the words "and any justice of the Supreme Court of the Territory of Hawaii": *Provided*, That the amendments made by this subsection shall not affect the rights of any judge or justice who may have retired before the effective date of this subsection: *And provided further*, That service as a judge of the District Court for the Territory of Hawaii or as a judge of the United States District Court for the District of Hawaii or as a justice of the Supreme Court of the Territory of Hawaii or as a judge of the circuit courts of the Territory of Hawaii shall be included in computing under section 371, 372, or 373 of title 28, United States Code, the aggregate years of judicial service of any person who is in office as a district judge for the District of Hawaii on the date of enactment of this Act;

(e) section 92 of the Act of April 30, 1900 (ch. 339, 31 Stat. 159), as amended, and the Act of May 29, 1928 (ch. 904, 45 Stat. 997), as amended, are repealed;

(f) section 86 of the Act approved April 30, 1900 (ch. 339, 31 Stat. 158), as amended, is repealed;

(g) section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(h) section 3772 of title 18, United States Code, as heretofore amended, is further amended by

striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(i) section 91 of title 28, United States Code, as heretofore amended, is further amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,"; and

(j) the Act of June 15, 1950 (64 Stat. 217; 48 U.S.C., sec. 644a), is amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,".

SEC. 15. All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii, except as provided in section 4 of this Act with respect to the Hawaiian Homes Commission Act, 1920, as amended; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States: Provided, That, except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first. As used in this section, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Hawaii) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii

prior to its admission into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Hawaii at the time of its admission into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provision of this Act.

SEC. 16. (a) Notwithstanding the admission of the State of Hawaii into the Union, the United States shall continue to have sole and exclusive jurisdiction over the area which may then or thereafter be included in Hawaii National Park, saving, however, to the State of Hawaii the same rights as are reserved to the Territory of Hawaii by section 1 of the Act of April 19, 1930 (46 Stat. 227), and saving, further, to persons then or thereafter residing within such area the right to vote at all elections held within the political subdivisions where they respectively reside. Upon the admission of said State all references to the Territory of Hawaii in said Act or in other laws relating to Hawaii National Park shall be deemed to refer to the State of Hawaii. Nothing contained in this Act shall be construed to affect the ownership and control by the United States of any lands or other property within Hawaii National Park which may now belong to, or which may hereafter be acquired by, the United States.

(b) Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the

United States and held for Defense or Coast Guard purposes, whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided*, (i) That the State of Hawaii shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land; (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall est and remain in the United States only so long as the particular tract or parcel of land involved is controlled or owned by the United States and used for Defense or Coast Guard purposes: *Provided, however*, That the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense.

SEC. 17. The next to last sentence of the first paragraph of section 2 of the Federal Reserve Act (38 Stat. 251) as amended by section 19 of the Act of July 7, 1958, (72 Stat. 339, 350) is amended by inserting after the word "Alaska" the words "or Hawaii."

SEC. 18. (a) Nothing contained in this Act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Hawaii and other ports in the United States, or possessions, or is conferring on the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

(b) Effective on the admission of the State of Hawaii into the Union—

(1) the first sentence of section 506 of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1156), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or";

(2) section 605(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1175), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or"; and

(3) the second paragraph of section 714 of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1204), is amended by inserting before the words "an island possession or island territory" the words "the State of Hawaii, or".

SEC. 19. Nothing contained in this Act shall operate to confer United States nationality, nor to termi-

nate nationality heretofore lawfully acquired, or restore nationality heretofore lost under any law of the United States or under any treaty to which the United States is or was a party.

SEC. 20. (a) Section 101 (a) (36) of the Immigration and Nationality Act (66 Stat. 170, 8 U.S.C., sec. 1101(a) (36)) is amended by deleting the word "Hawaii,".

(b) Section 212(d) (7) of the Immigration and Nationality Act (66 Stat. 188, 8 U.S.C. 1182(d) (7)) is amended by deleting from the first sentence thereof the word "Hawaii," and by deleting the proviso to said first sentence.

(c) The first sentence of section 310 (a) of the Immigration and Nationality Act, as amended (66 Stat. 239, 8 U.S.C. 1421 (a), 72 Stat. 351) is further amended by deleting the words "for the Territory of Hawaii, and".

(d) Nothing contained in this Act shall be held to repeal, amend, or modify the provisions of section 305 of the Immigration and Nationality Act (66 Stat. 237, 8 U.S.C. 1405).

SEC. 21. Effective upon the admission of the State of Hawaii into the Union, section 3, subsection (b), of the Act of September 7, 1957 (71 Stat. 629), is amended by substituting the words "State of Hawaii" for the words "Territory of Hawaii".

SEC. 22. If any provision of this Act, or any section, subsection, sentence, clause, phrase, or individual word, or the application thereof in any circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase, or individual word in other circumstances shall not be affected thereby.

SEC. 23. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed.

Approved March 18, 1959.

APPENDIX E

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 94-0-4207 (SSM)
Opinion of the Court; Notice of Entry

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,
Plaintiffs,

v.

HOUSING AND COMMUNITY DEVELOPMENT
CORPORATION OF HAWAII, ET AL.,
Defendants.

[STAMP: FILED 2002 DEC-5 AM 10:58]

OPINION OF THE COURT

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A. CONCLUSIONS

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OPINION OF THE COURT

I. INTRODUCTION

A. OVERVIEW

This lawsuit was triggered by the State's efforts in the mid-1990's to transfer ceded lands at Leali'i on Maui and La'i'opua on the Big Island to private entrepreneurs for the purpose of residential development.

In Counts I through III of their First Amended Complaint, which are the subject of this opinion,[1] Plaintiffs seek injunctive and declaratory relief prohibiting the State's sale of ceded lands, alleging that all sales are prohibited because of the State's trust obligations toward native Hawaiians as trustee of Public Lands Trust of the Hawaii State Constitution.[2] In their post-trial submissions, Plaintiffs alternatively seek a moratorium on any additional sales of ceded lands until the claims of the Native Hawaiian People are resolved.[3]

This opinion addresses the Plaintiffs' original and alternative claims for relief. Sections II and III provide factual and procedural backgrounds for the present dispute. Section IV outlines legal standards gov-

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[1] Counts IV and V, alleging improper valuation of the Leali'i lands, were bifurcated for later determination. *See* Section III, *infra*.

[2] *See* First Amended Complaint filed August 11, 1995.

[3] Both the OHA Plaintiffs' and Individual Plaintiffs' post trial submissions alternatively seek injunctions prohibiting sales of ceded lands until native Hawaiian claims are resolved. *See* OHA's "Proposed Opinion of the Court, Including Findings of Fact, Conclusions of Law," filed Dec. 19, 2001, p. 70, & "Individual Plaintiffs' Closing Argument," filed Dec. 17, 2001, p. 56.

erning injunctive and declaratory relief. Section V analyzes legal issues involved in Count II, Plaintiffs' request for injunctive relief prohibiting the sale of ceded lands at Leali'i on Maui. Section VI analyzes legal issues involved in determining Plaintiffs' claims for injunctive and declaratory relief in Counts I and II, *i.e.*, (1) whether the State has the legal authority to sell ceded lands (concluding that it does), and, if so, whether all sales of ceded lands constitute a breach of trust (concluding that they do not). Section VII addresses Plaintiffs' request for a moratorium on the sale of ceded lands pending-resolution of native Hawaiian claims, and concludes that principles of "justiciability" preclude the court from issuing such a moratorium. Finally, Section VIII contains the court's conclusions and orders.

Pursuant to Rule 52(a) of the Hawaii Rules of Civil Procedure, this opinion includes the court's findings of fact and conclusions of law. All factual findings included within this opinion were established by a preponderance of the evidence.

B. PARTIES

1. Plaintiffs

There are two sets of Plaintiffs. The first includes the OFFICE OF HAWAIIAN AFFAIRS ("OHA") and the individual Members of the Board of Trustees of OHA, in their official capacities[4] (collectively the "OHA

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[4] Pursuant to Rule 25(d) of the Hawaii Rules of Civil Procedure:

> **(d) Public Officers; Death or Separation from Office.**
>
> (1) When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and

Plaintiffs"). The second are persons who have filed suit in their individual capacities, namely, PIA THOMAS ALULI, JONATHAN KAMAKAWIWO'OLE OSORIO, CHARLES KA'AI'AI, and KEOKI MAKA KAMAKA KI'ILI (the "Individual Plaintiffs").

As explained in more detail below,[5] pursuant to Article XII, Section 4 of the Constitution of the State of Hawaii ("Hawaii State Constitution"); the State of Hawaii holds ceded lands "as a public trust for native Hawaiians and the general public." Hawaii Revised Statutes ("H.R.S.") Section 10-2 defines "native Hawaiian" as:

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

> the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

The Trustees of OHA have changed since the filing of this lawsuit, but pursuant to this Rule, the current Trustees are automatically substituted as Plaintiffs.

[5] *See* Section II(A)(3), *infra*.

The same statute defines "Hawaiian" as:

> any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

According to the OHA Plaintiffs, they bring this case on behalf of the "Native Hawaiian People," whom they define as including any individual who is (A) a citizen of the United States and (B) a descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii, as evidenced by (i) genealogical records, (ii) verification by kupuna (elders) or kama'aina (long-term community residents); or (iii) birth records of the State of Hawaii. The OHA Plaintiffs cite to Section 801(a) of the Hawaiian Homelands Ownership Act of 2000[6] for this definition of "native Hawaiian."

According to the Individual Plaintiffs:

> Although the Admission Act, the Hawaii Constitution and HRS Chapter 10 distinguish between "native Hawaiians" and "Hawaiians," the Apology Resolution and Hawaiian Homelands Ownership Act of 2000, Ex. 162; do not draw this distinction and instead use the term "Native Hawaiians." The Hawaiian Homelands Ownership Act of 2000 defines "Native Hawai-

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[6] Ex.162, Omnibus Indian Advancement Act, Title II, or the Hawaiian Homelands Ownership Act of 2000, Public Law No. 106-568, H.R. 5528 (2000) ("Hawaiian Homelands Ownership Act of 2000").

> ian" as "a descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii." *See* ¶ 59(B) of judicial notice order, Ex. 145. Three of the Individual Plaintiffs are "native Hawaiians" and all four of them are "Hawaiians" as defined in HRS § 10-2. *See* Individual Plaintiffs' identity stipulation, Ex. 397. For the sake of brevity, the remainder of this memorandum uses the term "Hawaiians," which is intended to include "Hawaiians" and "native Hawaiians" as defined in HRS § 10-2.[7]

In this opinion, the term "native Hawaiian" or "Hawaiian" is synonymous with the definition of "Hawaiian" under H.R.S. Section 10-2. The OHA Plaintiffs' definition of "Native Hawaiian People" is adopted for purposes of this opinion. The OHA Plaintiffs and Individual Plaintiffs are sometimes collectively referred to as "the Plaintiffs," and the people they represent are sometimes referred to collectively as "the Native Hawaiian People."

2. Defendants

The named Defendants are the STATE OF HAWAII (the "State"), the HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII ("HCDCH"), and the Executive Director and Members of the Board of Directors of HCDCH, as well

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[7] "Individual Plaintiffs' Closing Argument," filed Dec. 17, 2001, p. 3, fn. 2.

as the Governor of the State of Hawaii.[8] HCDCH was known as the Housing Finance and Development Corporation ("HFDC") until June 30, 1998.[9]

The various Defendants are sometimes collectively referred to as "the Defendants."

II. FACTUAL BACKGROUND[10]

A. HISTORICAL BACKGROUND

1. Pre-Statehood

This case involves fundamental issues concerning Hawaii's ceded lands and the trust responsibilities of the State of Hawaii in relation to the Native Hawaiian People. A historical background is, therefore, appropriate to provide context. The factual findings that follow are taken primarily from federal and state legislative enactments. In addition, this court has taken judicial notice of many of these adjudicative facts.[11]

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[8] Pursuant to Rule 25(d) of the Hawaii Rules of Civil Procedure, *quoted in* fn. 4, *supra*, the current directors of the HCDCH and Governor Linda Lingle are automatically substituted as defendants.

[9] *See* Act 350 of 1997, section 18.

[10] This section contains the court's factual findings, as required by Rule 52(a) of the Hawaii Rules of Civil Procedure. Some factual findings are also contained in other sections of the opinion. To the extent these findings of fact contain conclusions of law, they are to be so construed, except that Section II(B) is intended to constitute findings of fact. To the extent any other sections of this opinion contain findings, of fact, they are to be so construed.

[11] *See* "Order Granting OHA Plaintiffs' Motion For Judicial Notice Filed 8/9/99," filed on Sept. 6, 2000. Pursuant to Rule 201 of the Hawaii Rules of Evidence, the court can take judicial notice of

Before the arrival of the first Europeans in 1778, the Native Hawaiian People lived in a highly organized, self-sufficient subsistence social system based on communal land tenure with a sophisticated language, culture, and religion.[12] Native Hawaiians continue at present to comprise a distinct and unique indigenous people with historical continuity to the original inhabitants of the Hawaiian archipelago, whose society was organized as a nation prior to the arrival-of the first non-indigenous people in 1778.[13]

Unified monarchial government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii.[14] From 1826 until 1893, the United States recognized the independence of and extended full and complete diplomatic recognition to the

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certain adjudicative facts, which are then accepted as conclusively proven.

[12] Ex. 1, The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) ("1993 Apology Resolution"), whereas para. 1; Ex. 72, The Native Hawaiian Education Act of 1994, 20 U.S.C. secs. 7902-12 (West Supp. 1998) ("1994 Education Act"), Findings, para. 2; Ex. 75, The Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. secs. 11701-14 (1992) ("1992 Health Care Act"), Findings, para. 4;. Ex. 6, An Act Relating to Hawaiian Sovereignty, Act 359, 1993 Haw. Sess. Laws ("Act 359 of 1993"), Findings, para. 2.

[13] *See* Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 1; Ex. 72, 1994 Education Act, *supra* note 12 para. 1; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 1.

[14] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 2; Ex. 72, 1994 Education Act, *supra* note 12, Findings, para. 3; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 5; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 3.

Kingdom of Hawaii, and entered into treaties and conventions to govern commerce and navigation with Hawaii in 1826, 1842, 1849, 1875, and 1887.[15]

By most accounts, the Hawaiian Kingdom had achieved nation status by the mid-1800s and maintained that status up until the 1893 overthrow. The Permanent Court of Arbitration at the Hague in *Larsen* v. *Hawaiian Kingdom* noted that: "A perusal of the material discloses that in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties."[16] The Hawaiian Kingdom, especially during the term of King Kamehameha III, adopted European legal and political systems, such as the mahele process, a private land ownership system, as well as civil and criminal laws.[17] The Hawaiian Kingdom also entered into treaties with many additional nations, including:

Belgium in 1862;
Bremen in 1851;
Denmark in 1846;

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[15] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 3; 1992 Health Care Act, *supra* note 12, Findings, para. 6; Ex. 72, 1994 Education Act, *supra* note 12, Findings, para. 4; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 4; Ex. 162, Hawaiian Homelands Ownership Act of 2000, *supra* note 6, sec. 202(12).

[16] Ex. 354, Arbitral Award, *Larsen* v. *Hawaiian Kingdom* (Feb. 5, 2001), at §7.4. *See also* Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at pp. 131-32.

[17] Ex. 370, 1891 Hawaiian Almanac and Annual "A Brief History of Land Title in the Hawaiian Kingdom."

France 1846 and 1857;
Germany in 1879;
Great Britain in 1836, 1846 and 1851;
Hamburg in 1848;
Hong Kong (Colony of Great Britain) in 1884;
Italy in 1863;
Japan in 1871 and 1886;
Netherlands in 1862;
New South Wales (Colony of Great Britain) in 1874;
Portugal in 1882;
Russia in 1869;
Samoa in 1887;
Spain in 1863;
Swiss Confederation in 1864;
Sweden and Norway in 1852; and
Tahiti (Protectorate of France) in 1853.[18]

On January 14, 1893, John L. Stevens, the United States Minister assigned to this sovereign and independent Kingdom of Hawaii, conspired with a small group of non-Hawaiian residents, including citizens of the United States, to overthrow the government.[19] In pursuance of this conspiracy, Minister Stevens and the naval representative of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near government buildings and the

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[18] Ex. 355, July 5, 2001 Hawaiian Kingdom Complaint filed with U.N. Security Council, pp. 21-39.

[19] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 5; Ex. 7, 1992 Health Care Act, *supra* note 12, Findings, para. 7; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 5.

Iolani Palace to intimidate Queen Lili'uokalani and her government.[20]

On the afternoon of January 17, 1893, a Committee of Safety, which represented United States and European sugar planters, descendants of missionaries, and financiers, deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government.[21] Minister Stevens thereupon extended diplomatic recognition to the Provisional Government formed by the conspirators without the consent of the Native Hawaiian People or the lawful government of Hawaii and in violation of treaties between the two nations and international law.[22]

Soon thereafter, when informed of the risk of bloodshed that would result from resistance, Queen Lili'uokalani issued the following statement in Honolulu on January 17, 1893, yielding her authority to the United States Government rather than to the Provisional Government:

> I, Lili'uokalani, by the Grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Ha-

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[20] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 6; Ex. 7, 1992 Health Care Act, *supra* note 12, Findings, para. 8; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 6.

[21] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 7.

[22] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 8; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 8; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 6.

> waiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.[23]

Without the active support and intervention of the United States diplomatic and military representatives, the insurrection against the government of Queen Lili'uokalani would have failed for lack of popular support and insufficient arms.[24] On February 1, 1893, Min-

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[23] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 9.

[24] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 10; Ex. 71, Senate Committee on Indian Affairs Report 107-66, 107th Cong., 1st Sess., Sept. 21, 2001, *Expressing the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes* (hereafter "Committee Report 107-66"), at pp. 1-2.

ister Stevens raised the United States flag and proclaimed Hawaii to be a protectorate of the United States.[25]

The report of a Presidentially-established investigation conducted by former Representative James Blount into the events surrounding the insurrection and overthrow of January 17, 1893 concluded that United States diplomatic and military representatives had abused their authority and were responsible for the change in government.[26] As a result of this investigation, John L. Stevens, was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission.[27]

In a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war committed with the participation of a diplomatic representative of the United States and without authority of Congress," and acknowledged that by such acts the government of a peaceful and friendly people was overthrown.[28] President Cleveland further concluded that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured

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[25] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 11.

[26] *See id.*, whereas para. 12.

[27] *See id.*, whereas para. 13.

[28] *See id.*, whereas para. 14; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 9; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 7.

people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy.[29]

Queen Lili'uokalani and the Hawaiian Patriotic League, representing the aboriginal citizens of Hawaii, promptly petitioned the United States for redress of these wrongs and for restoration of the indigenous government of the Hawaiian Nation, but this petition was not acted upon.[30] The Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States.[31] The Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate to conduct a new investigation into the events surrounding the overthrow of the monarchy.[32]

The Committee and its chairman, Senator John Morgan of Alabama, conducted hearings in Washington, D.C., from December 27, 1893 through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii.[33] Although the Provisional Government was able

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[29] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 15; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 7; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 9.

[30] *See* Ex. 75, 1992 Health Care Act,, *supra* note 12, Findings, para. 10; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 8.

[31] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 16.

[32] *See id.*, whereas para. 17.

[33] *See id.*, whereas para. 18.

to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to obtain the support of two-thirds of the Senate needed to ratify a treaty of annexation.[34]

On July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii.[35] On January 24, 1895, while imprisoned in Iolani Palace, Queen Lili'uokalani was forced by representatives of the Republic of Hawaii to abdicate her throne.[36]

William McKinley won the 1896 Presidential election, and in 1897, replaced Grover Cleveland as President.[37] President McKinley negotiated an annexation treaty and presented it to the Senate, but the Senate refused to give its consent by the required two-thirds vote. Pro-annexation forces in the House of Representatives then introduced a joint resolution of annexation in 1898, which was passed (during the Spanish-American War) by a simple majority in each chamber of Congress, and signed by President McKinley on July 27, 1898.[38]

This "Newlands Resolution" was adopted by Congress without the consent of or compensation to the indigenous people of Hawaii or their sovereign government, who were thereby denied the mechanism for ex-

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[34] *See id.*, whereas para. 19.

[35] *See id.*, whereas para. 20.

[36] *See id.*, whereas para. 21.

[37] *See id.*, whereas para. 22.

[38] Resolution of Annexation of July 7, 1898, 30 Stat. 750 (1898).

pression of their inherent sovereignty through self-government, and who were also denied their right to self-determination, their lands, and their ocean resources.[39] Through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States and Congress ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States.[40]

Pursuant to the Newlands Resolution, the Republic of Hawaii thus ceded to the United States 1.75-1.8 million acres of land, which had been the Crown, Government, and Public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian . People of Hawaii or their sovereign government. The Newlands Resolution stated that "[t]he existing laws of the United States relative to public lands shall not apply to such [public] land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition" and the revenues from the lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes." In the Organic Act of 1900,[41] the United States Congress exempted these ceded lands from the then-existing public land laws of the United States by mandating that all reve-

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[39] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 23; Ex. 75, 1992 Health Care Act, *supra* note 12 Findings, para. 11; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 9.

[40] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas paras. 24 and 26.

[41] Organic Act of April 30, 1900, 31 Stat. 141 (1900).

nue and proceeds from the lands be "used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes," thereby establishing "a special trust relationship between the United States and the inhabitants of Hawaii."[42]

The Native Hawaiian People actively opposed the annexation of the Hawaiian Islands by the United States, as evidenced by resolutions they adopted and sent to Washington, D.C., signed by 21,269 people, representing more than fifty percent of the native Hawaiian population in Hawaii at that time.[43] The indigenous Hawaiian people never directly relinquished claims to their inherent sovereignty as a people or over their national lands to the United States, either through their government or through a plebiscite or referendum.[44]

The Organic Act of 1900 established a government for the Territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United

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[42] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 25; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 12; Committee Report 107-66, *supra* note 24, at p. 12. n.5; *Rice* v. *Cayetano*, 528 U.S. 495 (2000).

[43] *See* Committee Report 107-66, *supra* n. 24, at p. 12 n.4; Tom Coffman, *Nation Within: The Story of American's Annexation of the Nation of Hawaii*, Ex. 30; Affidavit of Tom Coffman, Ex. 572. In 1896, the census data reported 38,504 persons of Hawaiian ancestry. Ex. 528. *See also Ku'e: The Hui Aloha 'Aina Anti-Annexation Petitions 1897-98*, Ex. 31.

[44] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, whereas para. 29; Committee Report 107-66 *supra* note 24, at p. 2.

States. This action was taken without any vote of the Hawaiian people or any compensation to them.[45]

In 1921, Congress enacted the Hawaiian Homes Commission Act, 1920,[46] which designated about 200,000 acres of the ceded public lands for exclusive homesteading by native Hawaiians, thereby affirming the trust relationship between the United States and the native Hawaiians,[47] positing that it was constitutionally proper for the United States government to establish special programs for the Native Hawaiian People.[48] Under this program as it is administered to-

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[45] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, whereas para. 30.

[46] 42 Stat. 108 et seq.

[47] *See* 1992 Health Care Act, Ex. 75, *supra* note 12, Findings, para. 13; 1994 Education Act, Ex. 72, *supra* note 12, Findings, para. 8; Hawaiian Homelands Homeownership Act of 2000, Sec. 202(3).

[48] U.S. executive-branch officials and members of Congress explicitly recognized that native Hawaiians had the same rights as other Native Americans in the hearings that led to the passage of the Hawaiian Homes Commission Act in 1921. *See, e.g., Ahuna* v. *Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Hawaii 1982) (quoting Secretary of the Interior Franklin K. Lane as referring to native Hawaiians as "our wards ... for whom in a sense we are trustees"). *See also Hearings Before the House Committee on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-30 (1920) (quoting Secretary of the Interior Franklin D. Lane as saying that the basis for granting special programs for native Hawaiians is "an extension of the same idea" that justifies granting such programs for Indians); *id.* at 169 (quoting Representative Curry, the Chair of the Committee, as saying: "And the Indians received lands to the exclusion of other citizens. That is certainly in line with this legislation, in harmony

day, title to the land is retained by the State of Hawaii and Native Hawaiian homesteaders have a leasehold interest.[49] Congress has enacted numerous laws that provide special programs for native Hawaiians or include native Hawaiians in programs designed for Native Americans generally.[50]

2. Statehood And The Admission Act

On August 21, 1959, Hawaii became the fiftieth state of the United States of America. As a condition of statehood, Congress required the new state to adopt the Hawaiian Homes Commission Act[51] and, pursuant to Section 5(b) of the Admission Act, transferred another 1.2 million acres of public lands to the State, but

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with this legislation."); *id.* at 170 (quoting Chair Curry, in response to a question from Representative Dowell about whether native Hawaiians might be different because "we have no government or tribe or organization to deal with," as saying that "We have the law of the land of Hawaii from ancient times right down to the present where the preferences were given to certain classes of people"). "In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for Native Hawaiians only." House Rpt. No. 839, 66th Cong., 2nd Sess., at 4 (1920).

[49] Testimony of Kali Watson, former head of the Department of Hawaiian Home Lands.

[50] *See* generally, Section II(A)(4)(b)(ii), *infra.*

[51] Congress expressly required the State of Hawaii to accept and adopt the Hawaiian Homes Commission Act, 1920, as a condition of granting statehood to Hawaii. *See, e.g.*, House Rpt. 109, 83rd Cong., 1st Sess., App. III, at 45.

also imposed a public trust obligation on these ceded lands:[52]

> Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other property, and to lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Section 5(f) of the Admission Act explicitly provides that the lands granted to the State of Hawaii upon admission are to be held by the State as a public trust:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or disposition of any such lands and the income therefrom, shall be held by said State as a public trust [1] for the support of the public schools and [2] other pub-

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[52] Section 5(b) of the 1959 Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

> lic educational institutions, [3] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [4] for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and [5] for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States[.]

By this provision, the United States "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f) of the [Admission Act]."[53] None of these transfers, either from the Republic of Hawaii to the United States, or from the United States to the State of Hawaii, involved the offer or acceptance of value for these lands, either to the Native Hawaiian People or the entities that assumed subsequent title.[54]

3. Creation Of The Public Lands Trust And OHA

The delegates to the 1978 Hawaii State Constitutional Convention ("1978 ConCon") proposed a series of

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[53] 42 U.S.C. § 11701(16); *see also* Committee Report 107-66, *supra* note 24 at p. 15.

[54] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1.

constitutional amendments that were subsequently ratified by the voters and added to the Hawaii State Constitution. One of the amendments was to redesignate Article XI concerning "Hawaiian Home Lands" to Article XII dealing with "Hawaiian Affairs." As part of the new Article XII, a section was added to affirm that the State holds the ceded lands as a Public Land Trust, with native Hawaiians as one of the two named beneficiaries, along with the general public.

Article XII, Section 4 of the Hawaii State Constitution provides:

> PUBLIC TRUST
>
> **Section 4.** The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Furthermore, Article XII, Section 7 added constitutional protection for traditional and customary rights of native Hawaiians:

> TRADITIONAL AND CUSTOMARY RIGHTS
>
> **Section 7.** The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778,

subject to the right of the State to regulate such rights.

Article XVI, Section 7 was also amended to add the second sentence:

> **COMPLIANCE WITH TRUST**
>
> **Section 7.** Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians' under Section 4 of Article XII.

The 1978 ConCon also created the Office of Hawaiian Affairs and required the State to allocate a pro rata share of revenues from the Public Lands Trust to OHA to be used explicitly for the betterment of native Hawaiians. Specifically, the following provisions were added to become part of the new Article XII of the Hawaii State Constitution dealing with "Hawaiian Affairs":

> **OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES**
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> **Section 5.** There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law.

A board of trustees of OHA was also established:

POWER OF BOARD OF TRUSTEES

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Pursuant to the constitutional mandate creating OHA, in 1979, the Hawaii State Legislature promulgated legislation, now included in Chapter 10 of the Hawaii Revised Statutes, governing the administration of OHA. A few of the relevant provisions provide:

[§ 10-1] Declaration of purpose. (a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed

their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

...

§ 10-3 Purpose of the office. [Validity of 1990 amendment and retroactivity to June 16, 1980. L 1990, c 304,§§ 16, 18.] The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians;

(2) The betterment of conditions of Hawaiians;

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native

Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations.

...

§ 10-4 Office of Hawaiian affairs; established; general powers. There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property; real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they

shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers;

(6) To issue revenue bonds pursuant to this chapter in such principal amounts as may be authorized from time to time by law to finance the cost of an office project as authorized by law and to provide for the security thereof as permitted by this chapter;

(7) To lend or otherwise apply the proceeds of the bonds issued for an office project either directly or through a trustee or a qualified person for use and application in the acquisition, construction, installation, or modification of an office project, or agree with the qualified person whereby any of these activities shall be undertaken or su-

pervised by that qualified person or by a person designated by the qualified person;

(8) With or without terminating a project agreement, to exercise any and all rights provided by law for entry and re-entry upon or to take possession of an office project at any time or from time to time upon breach or default by a qualified person under a project agreement, including any action at law or in equity for the purpose of effecting its rights of entry or re-entry or obtaining possession of the project or for the payments of rentals, user taxes, or charges, or any other sum due and payable by the qualified person to the office pursuant to the project agreement; and

(9) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

§ 10-5 Board of trustees; powers and duties. The board shall have the power in accordance with law to:

(1) Manage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all moneys received by the office equivalent to that pro rata portion of the revenue derived from

the public land trust referred to in section 10-2;

(2) Exercise control over real and personal property set aside to the office by the State of Hawaii, the United States of America, or any private sources, and transferred to the office for native Hawaiians and Hawaiians; provided that all of the properties acquired by the office shall be controlled and managed for the purposes of this chapter, subject to any limitations of the trust provisions established by article XII, sections 5 and 6, of the state Constitution;

(3) Collect, receive, deposit, withdraw, and invest money and property on behalf of the office;

(4) Formulate policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under article XII, section 4, of the state Constitution;

(5) Otherwise act as a trustee as provided by law;

(6) Delegate to the administrator, its officers and employees such powers and duties as may be proper for the performance of the powers and duties vested in the board;

(7) Provide grants to public or private agencies for pilot projects, demonstrations, or both, where those projects or

demonstrations fulfill criteria established by the board;

(8) Make available technical and financial assistance and advisory services to any agency or private organization for native Hawaiian and Hawaiian programs, and for other functions pertinent to the purposes of the office of Hawaiian affairs. Financial assistance may be rendered through contractual arrangements as may be agreed upon by the board and any such agency or organization; and

(9) Adopt and use a common seal by which all official acts shall be authenticated.

4. Post OHA Creation

a. Ceded Lands Revenue Issues

As noted, Congress had stated explicitly in Section 5(f) of the Admission Act that the revenues produced from the ceded lands were to be used for five stated purposes; including "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." Until the 1978 ConCon, however, the State of Hawaii interpreted Section 5(f) to allow it to use the ceded lands revenues for any one of the five stated purposes, and, devoted the funds to public education, not specifically to native Hawaiians.[55]

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[55] *Rice* v. *Cayetano*, 146 F.3d 1077 (1999), *rev'd on other grounds*, 528 U.S. 495 (2000); Melody K. MacKenzie, *Native Hawaiian Rights Handbook* 19 (1991).

After OHA was created, the Hawaii Legislature began to pass legislation in an effort to fulfill the constitutional mandate to provide OHA with a share of ceded lands revenue.[56] As explained in *Office of Hawaiian Affairs* v. *State*:[57]

> In 1980, the legislature amended chapter 10 by adding HRS § 10-13.5, which provided that "[t]wenty per cent of all *funds* derived from the public land trust ... shall be expended by [OHA] for the purposes of this chapter." 1980 Haw. Sess. L. Act 273, at 525. However, "this too was not the final legislative word on OHA's pro rata share of funds from the trust." *Yamasaki*, 69 Haw. at 165, 737 P.2d at 453.
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> Between 1980 and 1983, OHA became increasingly dissatisfied with the State's lack of progress in fulfilling its obligations. In 1983, because OHA "felt the State was not allocating twenty per cent of all funds derived from the public land trust to OHA[,]" OHA sued the State and various officers thereof, seeking declaratory and injunctive relief. *Id.* The defendants moved to dismiss, but the circuit court denied the motions. On interlocutory appeal, this court reversed the circuit court's ruling and remanded for entry of an order dismissing the case as involving a nonjusticiable political question: Essentially, this court held that it was unable to determine the parameters of

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[56] *See* Hawaii State Constitution Art. XII, Sec. 6, *quoted at* p. 18, *supra*, and H.R.S. Sec. 10-5, *quoted at* p. 20-21, *supra*.

[57] 96 Haw. 388, at 391-92, 31 P.3d 901 (2001).

HRS § 10-13.5 "because the seemingly clear language of HRS § 10-13.5 actually provide[d] no 'judicially discoverable and manageable standards' for resolving the dispute[d] [issues in the case]." *Yamasaki*, 69 Haw. at 173, 737 P.2d at 457 (citation omitted).

In response, the legislature enacted Act 304. 1990 Haw. Sess. L. Act 304, at 947. Section 7 of Act 304 amended HRS § 10-13.5 to provide: "Twenty per cent of all *revenue* derived from the public land trust shall be expended by [OHA] for the betterment of the conditions of native Hawaiians." 1990 Haw. 96 Hawai'i 392] Sess. L. Act 304, § 7 at 951; HRS § 10-13.5 (1993) (as amended) (emphasis added). The legislature then defined "revenue" in section 3 of Act 304 to include all

> proceeds, fees, charges, rents, or other income ... derived from any activity[ ] that is situated upon and results from the actual use of ... the public land trust ..., but excluding any income, proceeds, fees, charges, or other moneys derived through the exercise of sovereign functions and powers including [12 enumerated descriptions of sources of revenue that are excluded from the term "revenue" under the statute].

1990 Haw. Sess. L. at 304, § 3 at 948; HRS § 10-2.

Section 8 of Act 304 provided a mechanism whereby the State, through the Department of Budget and Finance (B & F), and OHA were to determine the amounts owed to OHA for the

> period June 16, 1980 through June 30, 1991. 1990 Haw. Sess. L. Act 304, § 8, at 951. On April 16, 1993, the legislature appropriated funds for payment of approximately 130 million dollars to OHA pursuant to Act 304. 1993 Haw. Sess. L. Act 35, at 41. In a memorandum dated April 28, 1993, OHA and the State memorialized the results of their negotiations and noted that "[the Office of State Planning ("OSP")] and OHA recognize and agree that the amount specified in section 1 hereof does not include several matters regarding revenue which OHA has asserted is due OHA and which OSP has not accepted and agreed to." With respect to the matters agreed upon and in satisfaction thereof, the State, on June 4, 1993, tendered two warrants to OHA totaling $129,584,488.85.

The 1993 payment was made pursuant to Act 35 of 1993, and addressed OHA's claims with respect to its pro rata share of ceded lands revenue from June 16, 1980 through June 30, 1991. Pursuant to Act 329 of 1997, the Hawaii State Legislature set OHA's share of ceded lands revenue at $15,100,000 for each of fiscal years 1997-98 and 1998-99.[58]

In January of 1994, ten months before institution of the present lawsuit, OHA had filed the complaint in *Office of Hawaiian Affairs* v. *State of Hawaii*,[59] with respect to its claim that the State had failed to pay its pro

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[58] *See* Section 2 of Act 329, codified as H.R.S. §10-13.3.

[59] Civil No. 94-0-0205 in the Circuit Court of the First Circuit, State of Hawaii ("Civil No. 94-0-0205"). The Supreme Court's opinion appears at 96 Haw. 388, 31 P.3d 901 (2001).

rata share of other revenues that the State had collected since June 16, 1980 from the ceded lands, including revenue from airport lands.[60] In 1996, the lower court had ruled, *inter alia*, that the State must pay OHA twenty percent of certain airport revenues.[61] On September 12, 2001, based on Congress's intervening passage of the "Forgiveness Act,"[62] the Hawaii Supreme Court reversed the lower court's decision.[63]

The Hawaii Supreme Court concluded that the lower court's decision had been correct at the time it had been made.[64] Based, however, on Section 16 of Act 304, which provided that the entire Act would be held invalid if any section was found to be in conflict with federal law,[65] and due to Congress's passage of the "Forgiveness Act," the Hawaii Supreme Court held that Act 304, by its own terms, was effectively repealed.[66]

Based on the invalidation of Act 304 of 1990, the Supreme Court noted that it was "place[d] precisely

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[60] 96 Haw. 388, 31 P.2d 901 (2001).

[61] *See* "Order Granting Plaintiffs' Motions For Partial Summary Judgment," filed October 24, 1996, in Civil No. 94-0-0205.

[62] Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, §340, 111 Stat. 1425, 1448 (1998).

[63] 96 Haw. at 401.

[64] 96 Haw. at 395-96.

[65] *See* 96 Haw. at 397-98.

[66] *See* 96 Haw. at 401.

where it was at the time *Yamasaki* was decided."[67] Based on the lack of "judicially discoverable and manageable standards" "[i]n the absence of the substantive definition of 'revenue' provided in the now invalid Act 304," the Court again ruled that the unresolved issues of OHA's pro rata share of ceded land revenue to be a nonjusticiable question.[68]

The Supreme Court of the State of Hawaii concluded its opinion in *Office of Hawaiian Affairs* v. *State* by commenting as follows:

> Given our disposition of this case, and the context of, its complexity, we would do a disservice to all parties involved if we did not acknowledge that the State's obligation to native Hawaiians is firmly established in our constitution. *How* the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, § 7. Although this court cannot and will not judicially legislate a means to give effect to the constitutional rights of native Hawaiians, we will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution. . . .

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[67] *Id.*

[68] *Id.*

. . .

> Now, more than twenty years later, as we continue to struggle with giving effect to that enactment, we trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS § 10-13.5 and enact legislation that most effectively and responsibly meets those obligations.[69]

The court takes judicial notice that the2002 legislative session did not result in a legislative resolution of the void created by the effective repeal of Act 304 of 1990. Therefore, since September 2001, there has been no legislation in effect to define how to calculate OHA's portion of ceded lands revenue.

b. Congressional Actions

i. The 1993 Apology Resolution

In 1993, the same year as the tender of the $130 million to OHA in resolution of the ceded land revenue claims for 1980 to 1991, the United States Congress, on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii, adopted a joint resolution apologizing to native Hawaiians on behalf of the people of the United States. The Apology Resolution apologizes for the overthrow of the Kingdom of Hawaii on January 17, 1893, with the participation of agents and citizens of the United States, and for the deprivation of the inherent rights of native Hawaiians to self-determination and sovereignty. It also supports recognizes, and commends reconciliation efforts of the State

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[69] *Id.*

of Hawaii with native Hawaiians.[70] Congress concluded in this enactment of the Apology Resolution, which is binding upon this court,[71] that the overthrow of the

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[70] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, whereas para. 37 and Sec. 1: Acknowledgment and Apology, paras. 1 and 3.

[71] The 1993 Apology Resolution, *supra* note 12, Ex. 1, is a statute of the United States, and this court must take judicial notice of its findings pursuant to Section 202(b) of the Hawaii Rules of Evidence (Mandatory Judicial Notice of Law). *See also, State* v. *Lorenzo*, 77 Haw. 219, 221, 883 P.2d 641, 643 (Haw. App. 1994) ("The United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event. P.L. 103-150, 107 Stat. 1510 (1993)."). The 1993 Apology Resolution was formally enacted by Congress, passing the Senate by a roll-call vote of 65 to 34, and was signed by President Clinton on November 23, 1993. A "joint resolution" enacted by Congress as a public law and signed by the President is a statute of the United States and has the same effect as any other law enacted by Congress. *See, e.g., Ann Arbor R. Co.* v. *United States*, 281 U.S. 658, 666 (1930) (treating a joint resolution just as any other legislation enacted by Congress); Linde, Bunn, et al., *Legislative and Administrative Processes* 110 (1981) (Ex. 520) ("The prescribed form of a proposal for a statute is generally called a bill, *although Congress also uses the form of a joint resolution to enact legislation*" (emphasis added); Read, MacDonald, et al., *Materials on Legislation* 129 (4th ed. 1982) (quoting from R.M. Gibson, *Congressional Concurrent Resolutions: An Aid to Statutory Interpretation*, 37 A.B.A.J. 421, 422-23 (1951) (Ex. 521) ("In recent years much major legislation has taken the form of a joint resolution; it is now rather generally conceded that *a joint resolution of Congress is just as much a law as* a bill after passage and approval" (emphasis added)); Jack Davies, *Legislative Law and Process in a Nutshell* 66 (2d ed. 1986) (Ex. 522) ("A joint resolution originates in one house and, with the concurrence of the other house, has the force of official legislative action"); L. Harold Levinson, *Balancing Acts: Bowsher* v. *Synar, Gramm-Rudman-Hollings, and Beyond*, 72 Cornell L. Rev. 527, 545 (1987) (Ex. 523) ("Courts have consistently held that the legal effect of a joint resolution is identical to that of an enacted bill"); Goehlert and Martin, *Congress and Law-*

Kingdom of Hawaii was in violation of treaties between the Kingdom and the United States and of international law, that it could not have been accomplished without the assistance of U.S. agents, and that the subsequent "cession" of these lands to the United States in 1898 was "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government":

> **Whereas,** *without the active support and intervention by the United States diplomatic and military representatives,* the [January 1893] insurrection against the Government of Queen Liliuokalani *would have failed* for lack of popular support and insufficient arms;
>
> ....
>
> **Whereas** the Republic of Hawaii also ceded *1,800,000 acres of crown, government and public lands* of the Kingdom of Hawaii, *without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;*
>
> ....
>
> The Congress—
>
> (1) on the occasion of the 100th anniversary of *the illegal overthrow* of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event *which resulted*

Making: Researching the Legislative Process 42 (2d ed. 1989) (Ex. 524) ("In reality there is little difference between a bill and a joint resolution, as a joint resolution goes through the same procedure as a bill and has the force of law").

> *in the suppression of the inherent sovereignty of the Native Hawaiian people* .... [Emphasis added.]

Congress also expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian People, and urged the President of the United States to also acknowledge the ramifications and to support reconciliation efforts.[72]

Although, by its terms, the 1993 Apology Resolution does not itself "serve as a settlement of any claims against the United States,"[73] or "result in any changes in existing law,"[74] or itself create a claim, right, or cause of action,[75] it confirms the factual foundation for claims that previously had been asserted.[76]

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[72] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, sec. 1: Acknowledgment and Apology, paras. 4-5.

[73] *Id.*, sec. 3.

[74] S. Rep. No. 103-126 (1993) at 35, Ex. M.

[75] *Rice* v. *Cayetano*, 941 F.Supp. 1529, 1546 n.24 (D. Hawaii 1996), *rev'd on other grounds*, 528 U.S. 495 (2000).

[76] *See, e.g., State* v. *Lorenzo*, 77 Haw. 219, 221, 883 P.2d 641, 643 (Haw. App. 1994) (citing the 1993 Apology Resolution, *supra* note 12, Ex. 1, as reported above, for the proposition that "[t]he United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event."). Congress had made the proclamations in the 1993 Apology Resolution earlier in the 1992 Health Care Act, *supra*, note 12. Specifically, Congress proclaimed that the United States annexed Hawaii "without consent or compensation" to the indigenous people of Hawaii. Congress reaffirmed in the Health Care Act that the United States had recognized a "trust" relationship

ii. Other Congressional Actions

The United States has recognized a special responsibility for the welfare of the native peoples of the United States, including native Hawaiians.[77] The United States has recognized and reaffirmed that (A) native Hawaiians have a cultural, historic, and land-based-link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands; (B) the United States Congress does not extend services to native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship; (C) the United States Congress has also delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii; (D) the political status of native Hawaiians is comparable to that of American Indians; and (E) the aboriginal, indigenous people of the United States have (i) a continuing right to autonomy in their internal affairs and (ii) an ongoing

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with native Hawaiians for many years, and in recognition of that relationship had extended benefits to them similar to those provided to American Indians various federal statutes, including the Older Americans Act of 1964, 42 U.S.C.A. § 3001, *et seq.*, the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, the Veterans' Benefits and Services Acts of 1988, the Rehabilitation Act of 1973, 29 U.S.C.A. § 701, *et seq.*, the Native Hawaiian Health Care Act of 1988, the Handicapped Programs Technical Amendments of 1988, the Indian Health Care Amendments of 1988, and the Disadvantaged Minority Health Improvements Acts of 1990.

[77] *See* Hawaiian Homelands Ownership Act of 2000, *supra*, note 6, Sec. 202(2).

right of self-determination and self-governance that has never been extinguished.[78]

The political relationship between the United States and the Native Hawaiian People has been recognized and reaffirmed by the United States as evidenced[79] by the inclusion of native Hawaiians in (A) the Native American Programs Act of 1974,[80] (B) the American Indian Religious Freedom Act,[81] (C) the National Museum of the American Indian Act,[82] (D) the Native American Graves Protection and Repatriation Act,[83] (E) the National Historic Preservation Act,[84] (F) the Native American Languages Act of 1992,[85] (G) the American Indian, Alaska-Native and Native Hawaiian Culture and Arts Development-Act,[86] (H) the Job Training Partnership Act,[87] and (I) the Older Americans Act of 1965.[88]

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[78] *See* Hawaiian Homelands Ownership Act of 2000, *supra* note 6, Sec. 202(13).

[79] *See id.*, Sec. 202(14).

[80] 42 U.S.C. 2291 *et seq.*

[81] 42 U.S.C. 1996 *et seq.*

[82] 20 U.S.C. 80q *et seq.*

[83] 25 U.S.C. 3001 *et seq.*

[84] 16 U.S.C. 470 *et seq.*

[85] 106 Stat. 3434.

[86] 20 U.S.C. 4401 *et seq.*

[87] 29 U.S.C. 1501 *et seq.*

[88] 42 U.S.C. 3001 *et seq.*

In the area of housing, the United States has recognized and reaffirmed its political relationship with native Hawaiian People through[89] (A) the enactment of the Hawaiian Homes Commission Act, 1920,[90] which set aside approximately 200,000 acres of public lands that became known as Hawaiian Home Lands in the Territory of Hawaii that had been ceded to the United States for homesteading by native Hawaiians in order to rehabilitate a landless and dying people; (B) the enactment of the 1959 Admission Act[91] (i) by transferring to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held in public trust, for the betterment of the conditions of native Hawaiians, as that term is defined in section 201 of the Hawaiian Homes Commission Act, 1920, and (ii) by transferring the United States's responsibility for the administration of Hawaiian Home Lands to the State of Hawaii, but retaining the authority to enforce the trust; including the exclusive right of the United States to consent to any actions affecting the lands which comprise the corpus of the trust and any amendments to the Hawaiian Homes Commission Act, 1920, enacted by the legislature of the State of Hawaii affecting the rights of beneficiaries under the Act; (C) the authorization of mortgage loans insured by the Federal Housing Administration for the purchase, construction, or refinancing of homes on Hawaiian

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[89] *See* Hawaiian Homelands Ownership Act of 2000, *supra* note 6, Sec. 202(15).

[90] Hawaiian Homes Commission Act, 1920, 42 Stat. 108 *et seq.* (1921).

[91] An Act to Provide for the Admission of the State of Hawaii into the Union, 73 Stat. 4 (1959).

Home Lands under the Act of June 27, 1934;[92] (D) authorizing native Hawaiian representation on the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing;[93] (E) the inclusion of native Hawaiians in a housing loan program for Native American veterans;[94] and (F) the enactment of the Hawaiian Home Lands Recovery Act,[95] which establishes a process for the conveyance of Federal lands to the Department of Hawaiian Homes Lands that are equivalent in value to lands acquired by the United States from the Hawaiian Home Lands inventory.

c. The Hawaiian Sovereignty Movement And The Akaka Bill

In recent years, there have been discussions and movement toward the creation of a sovereign Hawaiian government, and this movement has received both state and federal recognition.

The State of Hawaii has recognized the right of the Native Hawaiian People to reestablish an autonomous sovereign government with control over the lands and resources.[96] Act 359 of 1993 established the Hawaiian

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[92] National Housing Act, 42 Stat. 1246 *et seq.*, chapter 847; 12 U.S.C. 1701 *et seq.*

[93] Public Law 101-235.

[94] 38 U.S.C. sec. 3764, applicable to subchapter V of chapter 37 of title 38, United States Code.

[95] Hawaiian Home Lands Recovery Act, 109 Stat. 357; 48 U.S.C. 491, note prec.

[96] *See* Act 359 (1993), which recognized that the Native Hawaiian People were "denied...their lands," Findings para. 9, and which also "recognized the Hawaiian sovereignty movement,"

Sovereignty Advisory Commission ("HSAC"), which was amended by Act 200 to become the Hawaiian Sovereignty Elections Council ("HSEC"). The court takes judicial notice that the HSEC conducted a Native Hawaiian Vote regarding sovereignty, and that various Hawaiian groups supporting different forms of sovereignty continue to be active.

The Hawaii State Senate and the State House of Representatives each passed resolutions in 2000 and 2001 supporting the recognition of an official political relationship between the United States government and the Native Hawaiian People, as well as the need to develop a government-to-government relationship between a native Hawaiian government and the United States.[97] The Hawaii Supreme Court has also recog-

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State v. *Lorenzo*, 77 Haw. at 221, 883 P.2d at 643; Act 200 (1994), through which the 1994 Hawaii State Legislature established a process designed to facilitate efforts of the Hawaiian people "to restore a nation of their own choosing;" Act 329 (1997), in which Hawaii's Legislature characterized the 1993 Apology Law as an accurate recounting of "the events of history relating to Hawaii and Native Hawaiians," called for a "lasting reconciliation" and "a comprehensive, just, and lasting resolution," and provided' partial funding to undertake a complete inventory of the Public Lands and established a joint committee consisting of representatives of the Governor, the Legislature, and OHA to determine "whether lands should be transferred to the office of Hawaiian affairs in partial or full satisfaction of any past or future obligations under article XII, section 6 of the Hawaii Constitution" (Section 3); H.R.S. Sec. 6K-9, stating that the Island of Kaho'olawe and its waters shall be transferred "to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii."

[97] *See* Committee Report 107-66 at 41 n. 91 and at 53-60 (reprinting H. Con. Res. 41 (2000), S. Res. 45 (2000), H. Con. Res. 23 (2001), and S. Res. 97 (2001)).

nized that native Hawaiians have the same legal status as other Native Americans and have separate and distinct legal rights under state law.[98]

In terms of the federal government, in December of 1999, the United States Departments of Interior and Justice initiated a process of reconciliation in response to the 1993 Apology Resolution. A report was issued on October 23, 2000 entitled *From Mauka to Makai: The River of Justice Must Flow Freely.*[99] The principal recommendation of this Report is as follows:

> It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103-150 (1993),

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[98] *See Ahuna* v. *Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1168-69 (1982) (to determine "the extent or nature of the trust obligations" owed to the native Hawaiians by this Department, the Court turned to "well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, *i.e.*, American Indians, Eskimos, and Alaska natives," because it recognized that Native Hawaiians have the same legal status as these other native peoples: "Essentially we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."); *Public Access Shoreline Hawaii* v. *Hawaii County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (recognizing and explaining the traditional and customary rights of native Hawaiians); *Ka Pa'akai O Ka 'Aina* v. *Land Use Commission*, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000) (confirming that "to the extent feasible when granting a petition for reclassification of district boundaries," the Land Use Commission must "protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians").

[99] Ex. 71.

> that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.

The Departments of Interior and Justice accepted Senator Akaka's definition of "reconciliation" as a "means for healing," as well as his statement that "a 'reconciliation' requires something more than being nice or showing respect. It requires action to rectify the injustices and compensation for the harm."[100]

The Report expressly states that the reconciliation process should be read as "merely the next step, as the

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[100] *Id.* at i.

United States and Native Hawaiians move forward in further dialogue," and "that the Federal Government should take action to address the needs and legitimate interests of Native Hawaiians," concluding that "[t]his reconciliation process should ultimately result in congressional confirmation of a political, government-to-government relationship between the Native Hawaiians and Federal Government pursuant to Congress' plenary authority over Indian Affairs.[101] Furthermore, the Report states that "Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government to government relationship with a representative Native Hawaiian governing body.[102]

The Report also acknowledges that Hawaiian Crown and Government lands were "impressed with a trust for the Native Hawaiian common people."[103] One of the Report's major recommendations is that past wrongs suffered by the Native Hawaiian people should be addressed as the United States moves forward in true reconciliation.[104]

Senate Bill 746,[105] entitled "Expressing the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Pur-

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[101] *Id.* at ii.

[102] *Id.* at 17.

[103] *Id.* at ii.

[104] *Id.* at 17-20.

[105] Ex. 27.

poses," was passed out of the Senate Committee on Indian Affairs on September 21, 2001, and is commonly referred to as "the Akaka Bill." The Committee Report on the Akaka Bill[106] explains that its purpose "is to authorize a process for the reorganization of a Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for the purpose of carrying on a government-to-government relationship."

The Akaka Bill, if enacted, would constitute the legislation called for by the *Mauka to Makai* Report. Section 8 of the proposed bill provides that the federal government is authorized to negotiate with the State and the reorganized Native Hawaiian government for a transfer of land and resources to a Native Hawaiian government. The Native Hawaiian government created by Senate Bill 746 would thus have a land base and resources and a status similar to that of other native peoples in the United States. The Committee Report to Senate Bill 746 explains that "it is the Committee's intent that the reference to 'lands, resources and assets dedicated to Native Hawaiian use' include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands."[107]

This legislation is still pending before the United States Congress.

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[106] Committee Report 107-66, *supra* note 24, Ex. 28.

[107] Ex. 7.

d. Lawsuits Challenging Hawaiian Rights

On February 23, 2000, the United States Supreme Court issued its decision in *Rice* v. *Cayetano*,[108] holding unconstitutional under the Fifteenth Amendment of the United States Constitution the portion of Article XII, Section 5 of the Hawaii Constitution that limited voting in OHA elections to Hawaiians. Since then, additional lawsuits have been filed challenging the constitutionality of OHA and the Department of Hawaiian Home Lands,[109] the constitutionality of Article XII, Sections 5 and 6 of the Hawaii State Constitution,[110] as well as the constitutionality of the Article XII of the Hawaii State Constitution relating to "Hawaiian Affairs, the Hawaiian Homes Commission, the Office of Hawaiian Affairs itself, as well as all benefits and entitlements based upon Hawaiian ancestry."[111]

B. DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW AND TREATMENT OF NATIVE AMERICAN CLAIMS

Plaintiffs presented evidence of the development of the law of international human rights and Native American rights in support of their claim that the course of history, as described in Section II(A) above,

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[108] 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

[109] *Arakaki* v. *Cayetano*, in the United States District Court for the District of Hawaii.

[110] *Carroll* v. *State of Hawaii*, in the United States District Court for the District of Hawaii.

[111] *Barrett* v. *State of Hawaii*, in the United States District Court for the District of Hawaii.

establish a "cloud" on the State's title to ceded lands, a claim analyzed in Section IV(B) below.

1. Development Of International Human Rights Law

During trial, the court heard from Professor James Anaya, a leading expert in the area of international human rights law. As explained by Dr. Anaya, there is a developing body of international law that favors indigenous peoples' rights, including the right to traditional lands. These laws include treaties and customary international law.[112]

Treaties to which the United States is a party include the International Covenant on Civil and Political Rights[113] and the International Convention on the Elimination of All Forms of Racial Discrimination.[114]

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[112] Transcript of testimony of James Anaya on Nov. 27-28, 2001, at pp. 6-13.

[113] International Covenant on Civil and Political Rights, Ex. 153 includes Article I, Section 2, which states:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[114] International Convention on the Elimination of All Forms of Racial Discrimination, Ex. 154, includes General Recommendation XXIII (51), which states:

> The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or

Customary international laws consist of norms that are generally accepted by the international community and can include treaties accepted by other countries but not ratified by the United States including, International Labor Organization ("ILO") Convention No. 169.[115]

For example, the Western Shoshone Indians relied on the International Convention on the Elimination of All Forms of Racial Discrimination to stop the United States from using their ancestral lands for mining and

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used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should be far as possible take the form of lands and territories.

[115] ILO Convention No. 169, Ex. 50, includes Article 14, which provides:

1. The rights of ownership and possession of the peoples concerned over the lands a\which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the land which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

nuclear waste storage pending resolution of their claims to the lands.[116]

Dr. Anaya represented the Awas Tingni tribe against The Republic of Nicaragua before the Inter-American Court of Human Rights.[117] The August 31, 2001 judgment held, in part, as follows:

> The Court deems that . . . the members of the Awas Tingni Community have a communal property right over the lands they currently inhabit, without prejudice to the rights of the neighboring indigenous communities. However, the Court emphasizes that the limits of the territory over which that property right exists have not been effectively delimited and demarcated by the State . . . In this context, the Court considers that the members of the Awas Tingni Community have the right that the State, a) delimit, demarcate, and title the territory of the Community's property; and b) refrain, until this official delimitation, demarcation and titling is performed, from acts which could cause agents of the State or third parties acting with its acquiescence or tolerance, to affect the existence, value, use, or enjoyment of the resources located in the geo-

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[116] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at p. 123.

[117] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at p. 60.

graphic area in which the Community members live and carry out their activities.[118]

Dr. Anaya opined that any sale of ceded lands prior to resolution of the Hawaiians' claim to those lands would violate international law including: (1) International Covenant on Civil and Political Rights, Article I, Section 2; (2) International Convention on the Elimination of All Forms of Racial Discrimination, General Recommendation XXIII (51); and (3) the customary international law norm of "an obligation made explicit for the government to take steps to make effective those rights ('indigenous peoples' property interests') and to make effective those rights and enjoyment of those rights and to remedy the violation of those rights."[119]

The *Mabo* v. *Queensland*[120] case is an example of how domestic courts have used international human rights laws to protect the aboriginal property rights.[121] Prior Australian appellate decisions had held that the discovery of Australia by England in the mid-1800s permitted England to acquire the sovereignty and territory of Australia by characterizing the area as *terra nullius*. In *Mabo*, the High Court of Australia held that for purposes of determining property ownership of land (as opposed to sovereignty and ownership of country) domestic property law based on local custom and

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[118] Ex. 519, Aug. 31, 2001 Judgment in *Awas Tingni* v. *Republic of Nicaragua*.

[119] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at pp. 120-23.

[120] *Mabo* v. *Queensland*, Ex. 569.

[121] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at pp. 94-98.

traditional native title as it existed prior to discovery governed, not English or international law.[122] The Court held that employing English law to nullify all property rights of the aborigines would "offend the values of justice and human rights,"[123] and instead used customary international norms to influence the common law of Australia.[124] The *Mabo* Court granted the aborigines title similar to that accorded American Indians under the Marshall trilogy described in the section below.[125]

2. Treatment Of Native American Claims

The court also heard from David Getches, a renowned expert in the law of area of Native American rights.[126] Since most American Indian tribes could not invoke the Law of Nations to recover lands they once possessed, they have used domestic law. American Indians have often convinced the United States to honor aboriginal use rights to land that they enjoyed under prior sovereignty.[127]

As explained by Professor Getches, three United States Supreme Court decisions written by then Chief Justice John Marshall defined the basic components of

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[122] *Mabo* v. *Queensland*, Ex. 569 at 36, 47.

[123] *Id.* at 25.

[124] *Id.* at 34-35.

[125] *Id.* at 59-60.

[126] Professor Getches' curriculum vitae is Ex. 35.

[127] Getches, *Alternative Approaches to Land Claims: Alaska and Hawaii* (1986), Ex. 39, at 330.

American Indian rights.[128] These decisions set forth that tribes were not nation states under the Law of Nations and thus lost their territories based on discovery.[129] However, they also recognized Indian title based on aboriginal possession of ancestral lands[130] and also recognized that the United States had a guardian-ward relationship with Indians.[131] A subsequent

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[128] Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 81-82; *Johnson* v. *M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation* v. *Georgia*, 30 U.S. 1 (1831); and *Worcester* v. *Georgia*, 31 U.S. 515 (1832).

[129] Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 85-86. *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 22 (1831) ("There are great difficulties hanging over the question, whether they can be considered as states under the judiciary article of the constitution. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered.")

[130] *Johnson* v. *M'Intosh*, 21 U.S. 543, 603 (1823) ("It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."); *Worcester* v. *Georgia*, 31 U.S. 515, 544 (1832) ("It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.")

[131] *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 18 (1831) ("They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.")

United States Supreme Court case held that the claim of an Indian tribe to particular lands need not be based upon a treaty, statute, or other formal government action.[132]

Although courts have held that the determination and extinguishment of Indian title based on aboriginal possession raise political and non justiciable issues, courts have enjoined sale of said lands prior to the determination of Indian title.[133] An example is an injunction issued the United States District Court for the District of Columbia in favor of the Native Village of

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[132] *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941) ("Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action.").

[133] *Id.* (Suit by the United States of America, as guardian of the Indians of the Tribe of Hualpai in the State of Arizona, against the Santa Fe Pacific Railroad Company, to enjoin the defendant from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona.); *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (Enjoining the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States pending resolution of pueblo's claim to title to those lands. "Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."); and *Native Village of Allakaket* v. *Rickel*, Civil Action No. 706-70 (1970).

Allakaket in *Native Village of Allakaket* v. *Hickel*.[134] In that case, the Village had pending claims for lands in Alaska before the United States Bureau of Land Management when the Secretary of the Interior attempted to transfer a right-of-way to oil companies to install a pipeline over said lands. The court, however, enjoined the issuance of a right-of-way for a pipeline through the area of the village without the consent of village officials.[135]

Indian occupancy necessary to establish aboriginal possession requires that the lands in question be the ancestral home of the tribe, as definable territory occupied exclusively by the tribe.[136]

Finally, as explained by Professor Getches, Congress often uses its plenary power under the Indian Commerce Clause of the Constitution to recognize Indian tribes as nations within a nation, and to also provide federally recognized and unrecognized tribes with lands and economic benefits.[137]

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[134] Civil Action No. 706-70 (D. D.C. 1970); Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 80-81.

[135] Professor Getches represented the Village in *Native Village of Allakaket* v. *Hickel*. Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 81.

[136] *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).

[137] *Rice* v. *Cayetano*, 528 U.S. 495, 519, 529-30 (2000).

C. THE CEDED LANDS

To summarize,[138] the lands that are now characterized as "ceded lands" and belonging to the Public Lands Trust, are those lands that were viewed as Crown, Government and Public Lands during the Kingdom of Hawaii, were then taken over by the Republic of Hawaii from 1893 to 1898 and then "ceded" to the United States in 1898. The acreage of these lands in 1898 was 1.75-1.8 million. In 1921, some 188,000 of these acres were allocated to the Department of Hawaiian Home Lands (and another 16,518 acres were transferred to the Department as settlement for past abuses in 1994[139]). In 1959, these lands were transferred to the new State of Hawaii, with the federal government retaining about 350,000 acres. In 1998, the Island of Kaho'olawe, consisting of 28,766 acres, was returned to the State, to be held in trust until the creation of a native Hawaiian nation.[140]

Thousands of acres of ceded lands have been sold by the State of Hawaii since statehood.[141] Although it is estimated that the ceded lands now comprise around

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[138] *See* Section II(A)(1), *supra.*

[139] In late 1994, the Board of Land & Natural Resources voted to return these lands and the Governor John Waihee, III signed an Executive Order.

[140] Public Law 103-109, Title X (1993). *See also* H.R.S. Sec. 6K-9, stating that the Island of Kaho'olawe and its waters shall be transferred "to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii."

[141] Testimony of Gilbert Coloma-Agoran; Ex. 175, Numerical Record of Land Patent Grants Issued by the Office of Commissioner of Public Lands.

1.2 million acres, the actual acreage and metes and bounds of the Public Lands Trust is unclear.[142] Through Act 329 of 1997, the Hawaii Legislature ordered that a comprehensive inventory be conducted of all lands comprising the public lands trust by the end of 1998. Extensions of this deadline have been granted, but this inventory has yet to be completed.[143]

No evidence was presented of any proposed future sales of ceded lands other than the lands at Leali'i. Even after issuance of Attorney General Opinion 95-3 on July 17, 1995,[144] upon which the State relied as legal authority for the sale of ceded lands,[145] the Administrator for the Lands Division of the DLNR wrote to the then Chair of DLNR, stating that "a moratorium" on the sale of ceded lands was in effect, and that "the current moratorium is based on the concern that the sale of ceded lands diminishes the corpus of the public lands and thereby diminishes the potential return to OHA."[146]

In addition, after then Governor Benjamin Cayetano received Attorney General Opinion 95-3, he stated a policy of proceeding cautiously, and on a case-by-case basis.[147] With respect to Leali'i and La'i'opua,

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[142] Testimony of Gilbert Coloma-Agoran.

[143] *Id.* & judicial notice.

[144] *See* Section VI(C), *infra*.

[145] *See* Ex. 404, Stipulation Re; Attorney General Opinion.

[146] Dec. 1, 1995 letter from Dean Uchida to Michael Wilson, Ex. 16.

[147] *See* Ex. 15, Aug. 15, 1995 letter from Governor Benjamin Cayetano to Clarence Mills, HFDC Chair.

Governor Cayetano asked HFDC to proceed because "the State has already invested substantial assets in these projects, and ... some of these sales in fact would benefit Native Hawaiians as well." He asked that "any further and new development or disposition of ceded lands shall be reviewed and approved only on a case by case basis."[148]

No evidence was presented of any pending proposals for the sale of ceded lands other than the lands at Leali'i.

D. IMPORTANCE OF LAND TO NATIVE HAWAIIANS

The Native Hawaiian People continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices, and institutions.[149]

"The health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."[150] 'Aina, or land, is of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency, and

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[148] *Id.* (emph. added).

[149] Testimony of Davianna McGregor; *See, in general,* "*Kupa'a i Ka 'Aina: Persistence on the Land,*" Dissertation of Davianna Pomaika 'i McGregor, A Dissertation Submitted to the Graduate Division of the University of Hawaii in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in History, December 1989, Ex. 19 ("McGregor Dissertation").

[150] Apology Resolution, *supra* note 13, Ex. 1, whereas para. 32.

their sense of personal and community well-being.[151] 'Aina is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable.[152] The natural elements—land, air, water, ocean—are interconnected and interdependent.[153] To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.[154] The 'aina is part of their 'ohana, and they care for it as they do for other members of their families.[155] For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.[156]

As a member of the Hawaiian Sovereign Advisory Committee ("HSAC"), which was created by Act 359 of 1993, Professor Davianna McGregor, an expert in the areas of Hawaiian history, culture, and practices, attended over a dozen meetings in Hawaiian communities.[157] One of the main purposes of the meetings was to determine the will of the Hawaiian people with re-

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[151] Testimony of Davianna McGregor.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See id.*; *see also*, testimonies and inferences from testimonies of Davianna McGregor, Hannah Springer, and Pua Kanahele; *see generally also*, Lilikala Kame'eleihiwa, *Native Land and Foreign Desires: Pehea La Pono Ai*? (1992) (Ex. 46). Professor McGregor's curriculum vitae is Ex. 18; Professor Kanahele's curriculum vitae is Ex. 44.

[157] McGregor testimony on 11/20/01.

spect to sovereignty. Professor McGregor pointed to HSAC's final report, which stated:

> The Hawaiian community on each island has almost unanimously called for a measure to ensure that Hawaiian national trust lands, the Hawaiian Homelands and the ceded public trust lands, will not be decreased or misused. The community does not want to get involved with a lengthy process to restore formal recognition of a Hawaiian sovereign nation and end up without a land base.[158]

The importance of land to the Native Hawaiian People is comparable to the importance of land to indigenous peoples throughout the world. As noted by Professor McGregor in her Dissertation, "Kupa'a i Ka 'Aina: Persistence on the Land,"[159] the United Nations Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities Working on Indigenous Populations conducted a study on the indigenous peoples of thirty-seven different countries, and concluded in part:[160]

> It must be understood that, for indigenous peoples, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is also essential to understand the special and pro-

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[158] Ex. 10, Feb. 18, 1994 Hawaiian Sovereignty Advisory Commission Final Report, at p.26.

[159] McGregor Dissertation, *supra* note 149, Ex. 19.

[160] *Id.*, p. 11.

> foundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture ... It is also essential to increase understanding of the profound sense of deprivation experienced by indigenous populations when the land to which they, as peoples, have been bound for thousands of years is taken away from them. No one should be permitted to destroy that bond.[161]

Professor David Getches, Plaintiffs' expert on Native American rights, also pointed out that despite differing value systems, native peoples throughout the United States have in common a sense of importance of land to their culture and well-being.[162] Examples were provided in which the government offered native tribes monetary compensation for lost lands, but was refused, with the tribes insisting on the return of lands.[163] Once native lands are alienated, compensation is problematic because the tribes must often use money damages to repurchase lands from private parties, and lands are often not available for repurchase.[164] From the perspective of Native Americans, it is preferable that any

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[161] *Id.*, *citing to*, United Nations, Subcommission on Prevention for Discrimination and Protection of Minorities Working Group on Indigenous Populations. Cobo, Jose R. Martinez, *Study of the Problem of Discrimination Against Indigenous Populations. Volumes I-V* (New York: United Nations, 1987) p. 39.

[162] Testimony of David Getches on Nov. 27, 2001, at pp. 77-78.

[163] Testimony of David Getches on Nov. 27, 2001, at pp. 56-61.

[164] Testimony of David Getches on Nov. 27, 2001, at pp. 61-63.

sale of ancestral lands be suspended until claims for the lands are resolved.[165]

Economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Native Hawaiian People.[166] The Native Hawaiian People have exhibited determination, however, to preserve, develop and transmit to future generations their ancestral territory,[167] and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.[168]

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[165] Testimony of David Getches on Nov. 27, 2001, at p. 63.

[166] *See* M. Look & K. Braun, *A Mortality Study of the Hawaiian People 1910-1990,* (The Queen's Health Systems 1995), Ex. 22; K. Braun, M. Look, & J. Tsark, *High Mortality Rates in Native Hawaiians*, 54-9 Haw. Med J. 723 (Sept 1995), Ex. 23; and K. Braun, H. Yang, M. Look, A. Onaka, & B. Horiuchi, *Age-Specific Native Hawaiian Mortality: A Comparison of Full, Part, and Non-Hawaiians*, 4-4 Asian Am. & Pac. Islander J. of Health 353 (Autumn 1996), Ex. 24; *See also,* Apology Resolution *supra* note 12, Ex. 1, whereas para. 33. Dr. Braun's curriculum vitae is Exhibit 21.

[167] With respect to the preservation of territory, the court also takes judicial notice that Native Hawaiian People have also been consistent in their opposition to various leasehold conversion measures, on the grounds that such conversions result in the further alienation of lands held by native Hawaiians or on behalf of native Hawaiians. Examples are the strong opposition to the state's original leasehold conversion law as well as more recent opposition to the City & County of Honolulu's leasehold conversion ordinance.

[168] *See* 1993 Apology Resolution, *supra* note 12 , Ex. 1, whereas para. 34; 1994 Education Act, *supra* note 12 , Ex. 72, Findings, para. 20.

E. PROPOSED SALE OF CEDED LANDS AT LEALI'I

In 1987, the HFDC began planning master residential communities on each island.[169] Based on a determination that there was a critical shortage of housing in West Maui, HFDC selected and proposed the Leal'i' site, and for similar reasons, selected the La'i'opua site in North Kona.

In December 1989, HFDC filed a petition with the Land Use Commission ("LUC") to reclassify the Leali'i lands from agricultural to urban use.[170] On or about January 24, 1990, HFDC wrote to Richard Paglinawan, then OHA Administrator, regarding the HFDC's intent to petition the LUC for an urban district boundary amendment for the Lahaina Parcel, and asked for OHA's testimony before the LUC.[171] Public hearings on the LUC Application for Leali'i were held before the LUC on April 10, 11 and 12, 1990.[172]

On April 10, 1990, OHA, through Linda DeLaney, its Land and Natural Resources Officer, gave oral testimony before the LUC with respect to the Leali'i project.[173] Her testimony on behalf of OHA recommended approval of the petition, conditioned upon the participation of OHA and DHHL in negotiations between HFDC and the BLNR for the exchange of the prop-

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[169] *See* Ex. X, Nov. 20, 1987 HFDC Request for Right of Entry to State Land at Honokawai and Wahikuli, Lahaina and Wakiu and Kawaipapa, Hana, Maui.

[170] *See* Ex. EE.

[171] *See* Ex. FF.

[172] *See* Ex. OO.

[173] *Id.*

erty, and additional conditions and consultation with OHA for protection of burial sites and other cultural resources.[174] HFDC's petition was granted in May 1990.[175] OHA did not request a contested case hearing.[176] Thereafter, OHA, DHHL, and HFDC negotiated for a "market value" for the property, from which OHA and DHHL would receive a proportion.

In 1992, the Legislature enacted Act 318, which established a formula to determine OHA's portion of revenues from the conveyances of land at Leali'i and La'i'opua. OHA presented testimony before the House Committee on Water, Land Use, and Hawaiian Affairs on March 17, 1992, relating to S.B. 2485, the bill that became Act 318.[177]

OHA's testimony before the House Committee focused on the difference between the provisions of Act 318, which entitle native Hawaiians to twenty percent of the value of raw, undeveloped lands for master planned communities, as opposed to the provisions of Act 304, which entitled OHA to twenty percent of "gross revenues."[178] OHA's request that the bill be set aside was based on its desire to have "Native Hawaiians be fully compensated as provided for by Act 304."[179] OHA did not express concern that the State

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[174] *Id.*

[175] *See* Ex. OO, May 18,1990 Findings of Fact, Conclusions of Law, Decision and Order in *In the Matter of the Petition of HFDC.*

[176] *Id.*

[177] *See* Ex. MMMMMM.

[178] *Id.*

[179] *Id.*

would be in breach of trust duties by the sale of Public Trust Lands to HFDC for residential development. OHA did not challenge the State's power to convey ceded lands for public purposes, actually stating, "OHA has no policy making powers relating to ceded land activities. The BLNR has exclusive power."[180]

In August 1992, William Paty, then BLNR Chair, sent a memorandum to Clayton Hee, then OHA Board Chair, relating to Leali'i and La'i'opua.[181] In that memorandum, Mr. Paty informed Mr. Hee that on August 28, 1992, the BLNR would render a decision on a Memorandum of Understanding ("MOU") for the conveyance of ceded lands to HFDC at LaTopua and Leali'i pursuant to Acts 317 and 318.[182] Mr. Paty included with the memorandum a copy of the BLNR submission in which BLNR's Land Management Administrator recommended that the BLNR adopt the MOU, which included specific statutory entitlements to OHA.[183]

On November 20, 1992, Joseph Conant, then Executive Director of HFDC, wrote to Robert Veraon, an appraiser with John Child & Co., Inc., containing instructions and assumptions to consider in establishing a

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[180] *Id.*

[181] *See* Ex.UU. Evidence at trial revealed that residential lots at La'i'opua lands were subsequently transferred to the Department of Hawaiian Home Lands, and have been distributed to native Hawaiian beneficiaries. Testimony of Kali Watson. In this lawsuit, Plaintiffs are not seeking to set aside any sales of La'i'opua lands.

[182] *Id.*

[183] *Id.*

market value for Leiali' and La'i'opua.[184] Mr. Conant sent a copy of that letter to OHA and its appraisers, the Hallstrom Group.[185] OHA responded with objections as to assumptions, but never questioned HFDC's ability to obtain good title to the land or to sell good title to individual homeowners.[186]

On or about July 27, 1993, OHA received written notice from the Keith Ahue, then BLNR Chair, that the ceded lands at Leali'i' would be sold by DLNR out of the Public Lands Trust to HFDC pursuant to Acts 317 and 318.[187] The memorandum indicated that the conveyance date of January 25, 1993 was moved to November 15, 1993.[188] OHA did not suggest at that time that the State could not or should not sell ceded lands in fee to HFDC for subsequent sale to private individuals.

On November 19, 1993, Ho'aliku Drake for DHHL and Clayton Hee for OHA jointly wrote a letter to Mr. Conant for HFDC confirming matters they had discussed at a meeting on August 9, 1993.[189] The letter suggested further cooperation between the parties

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[184] *See* Ex. VV.

[185] *Id.*; OHA and DHHL jointly hired the Hallstrom Appraisal Group to conduct an appraisal of the market value of Leali'i and La'i'opua. *See* Ex. AAAAAAA through DDDDDDD.

[186] *See* Ex. WW, Jul. 19, 1993 letter to Joseph Conant of HFDC.

[187] *See* Ex. Y, Jul 27, 1993 Memo to Clayton Hee, Chair of OHA, and Ho'aliku Drake, HHC, from Keith Ahue, BLNR Chair.

[188] *Id.*

[189] *See* Ex. ZZ.

with respect to the appraisals, and suggested another meeting after all appraisals-were complete.[190]

After adoption of the 1993 Apology Resolution in November 1993,[191] OHA did not immediately suggest that the State could not sell ceded lands. In fact, in December 1993, OHA retained the Hallstrom Group to perform "a limited scope *market value* appraisal of the *fee simple* interest in 583.202 acres ..." in Leali'i.[192] The purpose was to "estimate market value" in "fee simple," in order to calculate the DHHL and OHA entitlements.[193] In the letter confirming their engagement, the Hallstrom Group defined fee simple ownership as "absolute ownership unencumbered by any other interest or estate; subject only to the limitations of eminent domain, escheat, police power and taxation."[194] In arriving at the estimated market value, the Hallstrom Group "assumed that the subject property is free and clear of all encumbrances other than those referred to herein," and assumed that title is "good and marketable."[195] At no time in negotiating for a "market value" for Leali'i did OHA suggest that house lots at Leali'i could not be sold in fee, or that there would be a cloud on title if the sale took place.

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[190] *Id.*

[191] *See* Ex. OOOO.

[192] *See* Ex. AAA, Dec. 13, 1993 letter to Ho'aliku Drake, HHC Chair, and Clayton Hee, OHA Chair, from John E. Hallstrom; Ex. 99, Dec. 15, 1993 Appraisal.

[193] *Id.*

[194] Ex. 99, Dec. 15, 1993 Appraisal, at p. 11.

[195] *Id.* at p. 11-12.

Representatives of DLNR, HFDC, DHHL, and OHA met on July 11, 1994.[196] In a memorandum dated July 18, 1994, OHA Chair Hee confirmed that OHA would consider accepting the "fair-market value" of 575.322 acres of land at Leali'i to be conveyed as being $27,868,022, and that DHHL and OHA would accept compensation as a percentage of that amount.[197] OHA maintained that "acceptance of the sums [was] in no way a waiver of the right to receive *compensation* from any and all lands conveyed to HFDC," but did not suggested that sale of the land would in and of itself constitute a breach of trust.[198]

In September 1994, OHA first objected to the sale of ceded lands for the Leali'i project because attorney William Meheula[199] informed the OHA Board that acceptance of twenty percent of the fair market value might compromise Hawaiians' claim to ownership of the ceded lands.[200] On September 15, 1994, the OHA Board accepted Mr. Meheula's recommendation to include a disclaimer as part of any acceptance of funds.[201] The OHA Board understood that Mr. Meheula's clients

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[196] *See* Plaintiffs' Ex. 132, Memorandum to "All Participants" from Clayton Hee, Chair of OHA.

[197] *Id.*

[198] *Id.*

[199] Attorney for the Individual Plaintiffs in this case.

[200] Oct. 25, 1994 HFDC Board Workshop memo, Ex. 143.

[201] Sept. 15, 1994 OHA Board minutes, Ex. 78.

would sue the Board if OHA proceeded with the transaction without the appropriate disclaimer language.[202]

At OHA's request, on September 23, 1994, the Attorney General's Office suggested disclaimer language that the OHA Trustees "act solely for the purpose of implementing the provisions of Act 318, SLH 1992, and only on behalf of the Office of Hawaiian Affairs, and in no manner do they waive or otherwise act in furtherance or diminution of any claim the Hawaiian people may have in the land comprising the site of the Villages of Leali'i project."[203] On September 27, 1994, the OHA Board voted to accept this disclaimer language and requested that it be included in the proposed HFDC agreements.[204]

In October 1994, however, HFDC decided that it could not include the disclaimer in the HFDC agreements, because to do so would place a cloud on title, rendering title insurance unavailable to buyers in the Leali'i project.[205] OHA did not sign the HFDC agreements, but on November 4, 1994, DLNR transferred about 500 acres of ceded lands to HFDC for Leali'i.[206] On November 4,1994, Mr. Conant of HFDC transmit-

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[202] Testimony of Clayton Hee on Dec. 3, 2001; Sept. 23, 1994 Clayton Hee letter to Robert Marks, Ex. 555.

[203] Sept. 23, 1994 Charleen Aina letter to William Meheula, Ex. 5; Sept. 23, 1994 Robert Marks letter to Clayton Hee, Ex. 4.

[204] Sept. 27, 1994 OHA Board minutes, Ex. 79; Sept. 30,1994 Clayton Hee letter to Joseph Conant, Ex. 139.

[205] Oct. 13, 1994 Joseph Conant letter to Clayton Hee, Ex. 140; Oct. 25, 1994 HFDC Board Workshop memo, Ex. 143.

[206] Nov. 4,1994 Joseph Conant memo to Clayton Hee enclosing check and Land Patent, Ex. 145.

ted to Chair Hee of OHA a check in the amount of $5,573,604.40 as OHA's entitlement in accordance with Act 318.[207] OHA refused to accept the check.

DHHL accepted $8,360,406 from HFDC as its portion of revenue from sale of lands at Leali'i.[208] OHA continued to negotiate, however, for what it considered to be a fair appraisal of market value.[209] By that time, there were 103 lots graded with utilities available, ready for home construction at Leali'i. The total cost to HFDC for Leali'i at that time was over $31,000,000.[210]

After institution of this lawsuit in November 1994, due to the costs of defending title, title insurance companies refused to insure title to the lands at Leali'i.[211] Therefore, the development of Leali'i has been on hold because of this lawsuit.

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[207] *See* Ex. FFF.

[208] *See* Defendants' Ex. GGG, (Nov. 4, 1994, Transmittal to Ho'aliku Drake from Joseph Conant, attached check for $8,360,406; Nov. 4, 1994 Memo to Joseph Conant from Ho'aliku Drake returning check, in partial satisfaction of DHHL's purchase of a portion of other property from HFDC. According to Kali Watson, then Director of DHHL, DHHL used the funds to pay for another Native Hawaiian residential project. Testimony of Kali Watson on Nov. 30, 2001.

[209] Testimony of Clayton Hee on Nov. 30, 2001.

[210] Between 1991 and 1992, HFDC developed infrastructure and underlying utilities at La'i'opua for the project. Testimony of Michael McElroy, Project Manager for La'i'opua until 1997, on Nov. 30, 2001.

[211] *See* Transcript of Testimony of John Jubinsky on Nov. 27, 2001. *See* also, Ex. UUUUU, Mar. 16, 1999 from John Jubinsky, Title Guaranty, to Dawn N.S. Chang.

III. PROCEDURAL BACKGROUND

A. PROCEDURAL HISTORY

OHA filed the Complaint in this case on November 4, 1994.[212] On November 9, 1994, the Individual Plaintiffs filed a separate complaint in the Second Circuit Court for the State of Hawaii. The original complaint in this case was amended on August 11, 1995 to consolidate it with the one filed by the Individual Plaintiffs in the Second Circuit.

On December 15, 1995, Defendants filed a Motion for Partial Summary Judgment, on the grounds that this case raised a nonjusticiable political question, which was denied on July 23, 1996 by Judge Daniel Heely.

On February-17, 1998, the OHA Plaintiffs filed Motions to (1) Bifurcate Trial and (2) Continue Trial, seeking to bifurcate alternative Counts IV and V of the First Amended Complaint concerning the proper method of valuation of the lands, including the question of whether the lands should be valued in their improved or unimproved state. These motions were granted on April 6, 1998 by Judge Virginia Lea Crandall. The issues related to valuation of the ceded lands were thus bifurcated for a trial, to take place at a later time. Consequently, this opinion does not address the allegations of Counts IV and V.

On March 12, 1998, the Defendants filed a Motion To Dismiss Certain Counts and for Partial Summary Judgment, arguing that Counts I through III should be dismissed because of sovereign immunity and the po-

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[212] Nov. 4, 1994, OHA Board minutes, Ex. 81.

litical question doctrine. This motion was denied on August 27, 1998 by Judge Kevin Chang.

On August 28, 1998, Defendants filed Motions (a) To Dismiss First Amended Complaint Based On The Statutes Of Limitations And The Doctrine Of Laches, (b) To Dismiss Plaintiffs' First Amended Complaint For Failure To Join The U.S.A. As An Indispensable Party, and (c) To Amend their Answer to Plaintiffs First Amended Complaint To Include The Defense of the Statute of Limitations. On September 3, 1998 the Defendants filed a Motion for Leave To File Interlocutory Appeal from Order Denying Defendants' Motion to Dismiss Certain Counts and for Partial Summary Judgment. These motions were also denied by Judge Kevin Chang.[213]

On August 9, 1999, the OHA Plaintiffs filed a Motion for Judicial Notice requesting that this court take judicial notice of five state and federal statutes and the facts recited therein. This motion was-granted on September 6, 2000.[214] On December 4, 2001, this court

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[213] "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Ass 'n Inc.* v. *E. Home's Market, Inc.*, 385 U.S. 23, 25 (1966); *See also, Lind* v. *United Parcel Service*, 254 F.3d 1281, 1284, fn. 4 (11th Cir. 2001) ("An order *denying* a motion for partial summary judgment ... is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought."); *See generally*, Hawaii Rules of Civil Procedure Rule 56 (standard on summary judgment).

[214] The court ruled:

granted OHA Plaintiffs' oral motion to supplement this September 6, 2000 order with the additional factual findings in the Hawaiian Homelands Ownership Act of 2000.[215]

Trial without a jury began before this court on November 20, 2001, and proceeded through December 4, 2001. The OHA Plaintiffs were represented by Sherry P. Broder, Esq., and *pro hac vice* counsel Karen Sprecher Keating, Esq. The four individually-named plaintiffs were represented by William Meheula, Esq., and Hayden Aluli, Esq. The defendants were represented by John Komeiji, Esq., Patsy Kirio, Esq., Deputy Attorney General William Wynhoff, Esq., and Deputy Attorney General Linda Chow, Esq.

At the conclusion of the trial, the court required the submission of proposed findings and conclusions from all parties, and took the case under submission.

> that some of the numbered paragraphs in Exhibit F attached to Plaintiffs' Motion are facts and some are law, and the court is taking judicial notice of each and every paragraph, either as a matter of law or as fact. These facts are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the trial court and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

See Ex. 345.

[215] Hawaiian Homelands Ownership Act of 2000,, *supra* note 6, Ex. 162. The supplemental annotation of Exhibit F attached to OHA Plaintiffs' Motion for Judicial Notice filed August 9, 1999 was admitted as Ex. 345.

B. RELIEF SOUGHT BY PLAINTIFFS

Plaintiffs' First Amended Complaint of August 11, 1995 asserts five causes of action.

Count I requests an injunction on all sales of ceded lands, alleging that trust obligations under Article XII, Section 4 of the State Constitution prohibit the sale of fee title to ceded lands.[216] On the same basis, in Count II, Plaintiffs request that the court "stop the sale of ceded lands" at Leali'i to third persons.[217] In Count III, Plaintiffs ask the court for a declaratory ruling "that (a) any conveyance to a third party violates the Hawaii State Constitution and the Admissions Act, (b) and/or any sale of Ceded Lands does not directly or indirectly release or limit claims of Native Hawaiians to those lands."[218]

Counts IV and V of the First Amended Complaint are Plaintiffs' challenges to the process by which the HFDC valued the "market value" of ceded lands at Leali'i for purposes of compensating OHA.[219] Again, by Order Denying in Part and Granting in Part the [Aluli] Plaintiffs' Motion to Bifurcate Trial, or ... to Continue Trial, entered September 22, 1997, these counts were bifurcated for later determination and not at issue in this trial.

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[216] *See* First Amended Complaint, filed August 11, 1995, at para. 27-33.

[217] *Id.* at para. 39.

[218] *Id.* at para. 10.

[219] *See id.* at para. 44-46.

In their post-trial submissions, both the OHA Plaintiffs and Individual Plaintiffs alternatively seek injunctions prohibiting all sales of ceded lands until native Hawaiian claims are resolved.[220] By "resolution of native Hawaiian claims," Plaintiffs appear to mean a complete resolution of native Hawaiian claims to ceded lands, through transfer of a portion of the ceded lands to a sovereign Hawaiian government to be formed, or perhaps, to OHA.[221]

In this opinion, the court addresses both the Plaintiffs' original and amended claims for relief.

IV. STANDARDS GOVERNING REQUESTS FOR INJUNCTIVE AND DECLARATORY RELIEF

A. STANDARDS GOVERNING INJUNCTIVE RELIEF

Plaintiffs' post-trial alternative claim seeking a moratorium on the sale of ceded lands is tantamount to a request for *preliminary* injunctive relief. Plaintiffs' original claims request *permanent* injunctive relief, prohibiting any sale of ceded lands in perpetuity.

Hawaii's leading cases on preliminary injunctive relief are *Penn* v. *Transportation Lease Hawaii, Ltd.*,[222] and *Life of the Land* v. *Ariyoshi*,[223] which articulate the following standards for the granting of such relief:

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[220] *See* OHA's "Proposed Opinion of the Court, Including Findings of Fact, Conclusions of Law," filed Dec. 19, 2001, p. 70, & "Individual Plaintiffs' Closing Argument," filed Dec. 17, 2001, p. 56.

[221] *Id.*

[222] 2 Haw. App. 272, 630 P.2d 646 (1981).

[223] 59 Haw. 156, 577 P.2d 1116 (1978).

> The modern test for interlocutory relief is threefold: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of an interlocutory injunction? (3) To the extent that the public interest is involved, does it support granting the injunction?[224]

No reported Hawaii case discusses the requirements for entry of a permanent injunction. However, it is generally held that "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."[225]

A person or entity-seeking an injunction has the burden of proving the facts that entitle it to relief.[226] To establish irreparable injury, there must be some actual, viable, presently existing threat of serious harm—

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[224] *Penn*, 2 Haw. App. at 276, 630 P.2d at 650 *citing Ariyoshi*, *supra*, note 223.

[225] *See, Indian Motorcycle Ass'n. III Ltd. Ptp.* v. *Mass. Housing Fin. Agency*, 66 F.3d 1246 (1st Cir. 1995):

> Four principal factors govern the appropriateness of permanent injunctive relief: (1) whether the plaintiff has prevailed on the merits; (2) whether the plaintiff will supper irreparable injury absent injunctive relief; (3) whether the harm to the plaintiff outweighs any harm threatened by the injunction; and (4) whether the public interest will be adversely affected by the injunction.

Id. at 1249.

[226] *Modern Computer Systems, Inc.* v. *Modem Banking Systems, Inc.*, 871 F.2d 734, 737 (8th Cir. 1989).

one that is not remote or speculative.[227] In addition, when government agencies are involved, the court should allow the government the "widest latitude in the dispatch of its own internal affairs."[228]

It is important to note that injunctive relief is a remedy, not a cause of action.[229] In addition, it is an extraordinary remedy, "not a remedy which issues as of course."[230] It is "to be used sparingly, and only in a clear and plain case."[231] Even if injunctive relief is

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[227] *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953); *Tucker Anthony Realty Corp.* v. *Schelisinger*, 888 F.2d 969, 976 (2nd Cir. 1989).

[228] *Rizzo*, 423 U.S. at 378-379; *See also*, *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996) ("[I]t is not the role of courts, but that of political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.")

[229] *See Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 554 at n. 12 (1987); *see, also Reuben H. Donnelly Corp.* v. *Mark I Marketing Corp.*, 893 F. Supp. 285 (S.D.N.Y. 1985) (There is no "injunctive" cause of action under New York law); *Fletcher* v. *Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255 (W.D. Mo. 2001); *Lynch* v. *Snepp*, 350 F. Supp. 1134 (D.C.N.C. 1972) (An injunction is not a cause of action, but "a remedy which is ancillary to a pending suit.") *Randle* v. *City of Chicago Ill.*, 2000 WL 1536070 (N.D. Ill. 2000) ("Injunctive relief is a remedy, not an independent cause of action."); *County of Del Norte* v. *City of Crescent City*, 84 Cal. Rptr. 2d 179 (Cal. App. 1st Dist. 1999) ("A permanent injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action."); *Shell Oil Co.* v. *Richer*, 52 Cal. App. 2d 164, 168, 125 P.2d 930 (1942) ("Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.").

[230] *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1993).

[231] *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976).

proper, it must be tailored to the specific harm to be prevented.[232]

The law also provides that "[t]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction, has to show the likelihood of his success on the merits. [citations omitted.] Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction."[233]

B. STANDARDS GOVERNING DECLARATORY RELIEF

The granting of declaratory relief is governed by Chapter 632 of the Hawaii Revised Statutes. Section 632-1 provides:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case

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[232] *See Cok* v. *Family Court*, 985 F.2d 32, 34 (1st Cir. 1993); *Hypertherm, Inc.* v. *Precision Prods., Inc.*, 832 F.2d 697, 700-02 (1st Cir. 1987).

[233] *Penn* v. *Transportation Lease Hawaii, Ltd.*, 2 Haw. App. 272, 630 P.2d 646, 650 (Haw. App. 1981).

where a divorce or annulment of marriage is sought. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory

judgment in any case where the other essentials to such relief are present.

The court will now apply these standards governing injunctive and declaratory relief to the claims brought by the Plaintiffs.

V. ANALYSIS OF REQUEST FOR INJUNCTIVE RELIEF PROHIBITING SALE OF LANDS AT LEALI'I

A. SOVEREIGN IMMUNITY BARS PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF WITH RESPECT TO THE LEALI'I LANDS

As noted previously, Count II of Plaintiffs' First Amended Complaint seeks a permanent injunction prohibiting the sale of the Leali'i lands to any third person. As further noted above, title to these lands has already been transferred to the HFDC.[234]

In *Pele Defense Fund* v. *Paty*,[235] the Hawaii Supreme Court recognized a claim for breach of fiduciary duty to enjoin prospective violations of Article XII, Section 4 of the Hawaii Constitution. The Court concluded, however, that a request for injunctive relief to place a constructive trust on public lands that had already been exchanged is "'essentially equivalent' to a nullification of the exchange and the return of exchanged lands to the trust res. The effect on the State treasury would be "direct" rather than ancillary, as the State-would have to pay for the lands returned to the

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[234] *See* Section II(E), *supra*.

[235] *Pele Defense Fund* v. *Paty*, 73 Haw. 578, 837 P.2d 1247 (1992).

trust.[236] As such, the Court held that the claim was barred by sovereign immunity.[237]

Like the Plaintiffs in *Pele Defense Fund*, the Plaintiffs in this case ask the court to "turn back the clock and examine actions already taken by the State."[238] The Leali'i lands are no longer within the Public Lands Trust. Although the Plaintiffs argue that the lands were merely transferred to another State entity and that sovereign immunity therefore does not apply, the facts show that the State of Hawaii received payment for the transfer of these lands to the HFDC.[239] H.R.S. Section 171-2 specifically exempts from the definition of "public lands" those lands to which the HFDC holds title in its corporate capacity. To return the lands at Leali'i to the Public Lands Trust, the DLNR would have to expend moneys from the State treasury. Moreover, the HFDC has already spent millions of dollars improving those properties.[240]

Accordingly, this court cannot compel HFDC to return the lands at Leali'i to the Public Lands Trust without directly affecting the state treasury. Pursuant to *Pele Defense Fund* v. *Paty*, Plaintiffs' request for injunctive relief in Count II with respect to Leali'i is, therefore, barred by sovereign immunity.

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[236] *Id.*

[237] *Id.*

[238] *Pele Defense Fund*, 73 Haw. at 578, 837 P.2d at 1261.

[239] *See* Section II(E), *supra*.

[240] *Id.*

B. IN THE ALTERNATIVE, PLAINTIFFS HAVE WAIVED THEIR REQUEST FOR INJUNCTIVE RELIEF WITH RESPECT TO THE LEALI'I LANDS

Even if sovereign immunity did not bar Plaintiffs claim for injunctive relief with respect to the Leali'i lands, Plaintiffs, by their actions and inaction during the seven years between 1987 and 1994, as underscored above,[241] have waived any right they may have had to contest the sale of lands at Leali'i to HFDC as illegal.[242]

Waiver is the "intentional relinquishment of a known right, or such conduct as warrants an inference of such surrender, and it is not essential to its application that prejudice results to the party in whose favor the waiver operates."[243] Waiver includes the "intentional relinquishment of a known right," a "voluntary relinquishment of some rights," and "the relinquishment or refusal to use a right."[244] A waiver "may be expressed or implied[,]" and "may be established by ...

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[241] *Id.*

[242] Plaintiffs have suggested in argument that they did not raise their right to challenge the sale of land at Leali'i and La'i'opua to HFDC in fee because they relied on an opinion by Earl Anzai, as OHA's former attorney, suggesting that there would be a "cloud" on title even if the property were sold. Mr. Anzai subsequently became Attorney General under former Governor Cayetano. The court precluded his testimony based on relevance and Rule 403 grounds.

[243] *Hewahewa* v. *Lalakea*, 35 Haw. 213, 219 (1939).

[244] *Anderson* v. *Anderson*, 59 Haw. 575,586-87, 585 P.2d 938, 945 (1978).

agreement, or by acts and conduct from which an intention to waive may reasonably be inferred."[245]

The Individual Plaintiffs argue that they and their counsel relied on Congress's 1993 Apology Resolution and the Legislature's Act 359 of 1993 as central bases to seek an injunction in the fail of 1994 on the sale of ceded lands, pending resolution of the Hawaiians' claim to ownership of the ceded lands. Mr. Meheula's discussions with the OHA Board did cause OHA to insist in the fall of 1994 that a disclaimer be placed in the HFDC agreements.[246]

As a practical matter, however, neither OHA nor the Individual Plaintiffs objected to the sale of the Leali'i lands until the fall of 1994. In any event, even if Plaintiffs did not consider challenging the State's power to sell ceded lands until after the Apology Resolution was adopted in 1993, OHA's continuing negotiation for market value after the Apology Resolution was passed is also "conduct from which an intention to waive may reasonably be inferred."[247] Plaintiffs' failure to object to the development plan, which included market homes, before the LUC and Legislature in testimony relating to Act 318 is "wholly inconsistent with any dissatisfaction" with the development plan, also suggesting waiver of any right to challenge them.[248]

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[245] *Wilart Assoc.* v. *Kapiolani Plaza, Ltd.*, 7 Haw. App. 354, 359-60, 766 P.2d 1207, 1201-11 (1988) *citing* 28 Am. Jur. 2d *Estoppel and Waiver* § 160 at p. 845 (1966).

[246] *See* Section II(E), *supra*.

[247] *Wilart Assoc.*, 7 Haw. App. at 359-360, 766 P.2d at 1201-11.

[248] *See generally, Goo* v. *Hee Fat*, 34 Haw. 123 (1937) (failure to motion to set aside default judgment for two years and accep-

Moreover, HFDC and the State were prejudiced by their reliance on Plaintiffs' acquiescence in the development plan to sell land at Leali'i. As testified to by the project managers for both Leali'i and La'i'opua, there were no objections from OHA as to the State's power to sell public trust lands for those projects until November 1994.[249] By that time, however, $31 million had already been invested in Leali'i.[250]

Accordingly, the court concludes that, even if sovereign immunity was inapplicable, due to actions and inaction constituting waiver, Plaintiffs are barred from requesting injunctive relief with respect to the Leali'i lands.

C. IN THE ALTERNATIVE, PLAINTIFFS ARE ESTOPPED FROM OBTAINING INJUNCTIVE RELIEF WITH RESPECT TO THE SALE OF LEALI'I LANDS

For the same reasons that Plaintiffs waived any challenge to the legality of sales of Leain lands, Plaintiffs are estopped from making that challenge.

The Hawaii Supreme Court has articulated the doctrine of equitable estoppel as follows:

> The rule of law is clear that where one by his words, or conduct, wilfully causes another to believe the existence of a certain state of things, and induced him to act on that belief so as to alter his previous position, the former is

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tance of costs in motion clearly evinced a waiver of objection to them).

[249] Testimony of Michael McElroy on Nov. 30, 2001.

[250] *Id.*; Testimony of Neal Wu on Dec. 4, 2001.

> precluded from averring against the latter a different state of things, as existing at the same time.[251]

"A close cousin to the doctrine of equitable estoppel, quasi estoppel is grounded in the equitable principle that one should not be permitted to take a position inconsistent with a previous position if the result is to harm another ... Put in more colloquial terms, one cannot blow both hot and cold."[252]

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[251] *Molokai Ranch, Ltd.* v. *Morris*, 36 Haw. 218, 223 (1942); *Anderson*, 59 Haw. at 587-88, 585 P.2d at 946.

[252] *Univ. of Haw. Prof. Assembly* v. *Univ. of Haw.*, 66 Haw. 214, 221, 659 P.2d 720, 725-26 (1983), citing *Godoy* v. *County of Hawaii*, 44 Haw. 312, 320, 354 P.2d 78, 82 (1969); *Munoz* v. *Ashford*, 40 Haw. 675, 688 (1955); *Yuen* v. *London Guar. & Accident Co.*, 40 Haw. 213, 230 (1953); *Hartmann* v. *Bertelmann*, 39 Haw. 619, 628 (1952).

The doctrine of equitable estoppel is well illustrated by the facts involved in the case of *Univ. of Haw. Assembly* v. *Univ of Haw.*, 66 Haw. 214, 659 P.2d 720 (1983). In that case, the University of Hawaii, after entering into an arbitration agreement and proceeding to arbitration on a grievance filed by a faculty member, filed a motion to vacate the award alleging that the arbitrator did not have the authority to decide the grievance. In rejecting the University's attempt to avoid the award, the Supreme Court held that the University was equitably estopped, noting:

> We find this complaint untenable. The University could have either excluded subjects such as tenure and promotion from the ... arbitration provisions altogether, or it could have made it clear, at the outset of the arbitration proceedings, that it was not submitting to the arbitrator the power to actually grant tenure or promotion. As a result of the University's failure to raise its objections, the grievant has been substantially disadvantaged in terms of time and money spent in the arbitration process and in litigation. Estoppel by any name is based primar-

Applying equitable estoppel and quasi estoppel principles to the case at hand, during the years of negotiations and planning for Leali'i before Plaintiffs filed this lawsuit, Plaintiffs did nor suggest that they would file a lawsuit challenging the right to sell the lands at Leali'i to HFDC and in rum to third parties for their homes. During these same five years, the Plaintiffs had notice of the planned development at Leali'i, but chose not to challenge it. The State spent substantial amounts of time and money developing Leali'i before November 1994 when Plaintiffs first filed suit.

By their action (or inaction with respect to the Individual Plaintiffs) and conduct, as further described in Section II(E) above, Plaintiffs caused the HFDC to believe that no one would challenge its acquisition of the Leali'i lands as long as OHA and DLNR received fair monetary compensation for the lands. Plaintiffs' acquiescence in the development of Leali'i and HFDC's expenditure of funds for infrastructure, and OHA's active participation in negotiations for an appraised value for the ceded lands induced the State to continue moving forward with the housing development. The State obtained necessary land use changes, entered into agreements with developers, made agreements with county officials and spent over $31 million for infrastructure at Leali'i alone. The State significantly altered its position because of the statements and conduct of OHA, as well

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ily on considerations of justice and fair play, neither of which would be enhanced if the University were allowed to claim it had no idea what it was getting into when it agreed to arbitrate this grievance. We thus hold that the University is estopped from claiming the arbitrator was not empowered to grant tenure or promotion upon a finding of arbitrary or capricious conduct.

as the inaction of the Individual Plaintiffs.[253] Plaintiffs are, therefore, also estopped from challenging the State's sale of public trust lands lands at Leali'i.

It is true, as argued by the OHA Plaintiffs, that the doctrine of equitable estoppel cannot be invoked against a governmental agency such as OHA in the absence of overt detrimental reliance and "manifest injustice."[254] The law recognizes that governmental bodies must be able to change their minds in some circumstances. Thus, a mere change of mind by the govern-

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[253] *See, e.g., Maria* v. *Freitas*, 73 Haw. 266, 273, 832 P.2d 259, 264 (1992) ("[T]he theory of equitable estoppel requires proof that one person *wilfully* caused another person to erroneously believe a certain state of things, *and* that person *reasonably relied* on this erroneous belief to his or her detriment") (emphasis added)); *Ravelo* v. *County of Hawaii*, 66 Haw. 194, 658 P.2d 883 (1983) (ruling that a claim of estoppel could proceed based on allegations that the plaintiffs had quit their jobs and moved to the Big Island because of the county's assurance of employment); *Doherty* v. *Hartford Ins. Group*, 58 Haw. 570, 573,574 P.2d 132, 134-35 (1978) ("One invoking equitable estoppel must show that he or she has detrimentally relied on the representation or conduct of the person sought to be estopped and that such reliance was reasonable." (emphasis in original; citations omitted)).

[254] *See, e.g., State ex rel. Bronster* v. *Yoshina*, 84 Haw. 179, 932 P.2d 316 (1997) (rejecting an argument that the State Attorney General was barred by laches from bringing a claim designed to determine the proper interpretation of a provision of Hawaii's Constitution). Other decisions in the eastern claims cases have focused on defenses based on laches, estoppel, adverse possession, and statutes of limitations. Typically, these defenses have been struck as inconsistent with the government trust responsibility particularly with regard to the Nonintercourse act. *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); and *Schaghticoke Tribe* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976).

ment does not invoke estoppel unless the other party has detrimentally relied upon the agency's earlier position to such an extent that it would constitute a "manifest injustice" to fail to invoke and apply the doctrine. In this case, however, based on the facts above, the requisite showings of extensive detrimental reliance by and manifest injustice to the Defendants have been satisfied to invoke equitable estoppel against the OHA Plaintiffs.

Thus, the doctrine of estoppel prohibits both sets of Plaintiffs from seeking injunctive relief with respect to the sale of Leali'i lands.

D. IN THE ALTERNATIVE, THE SALE OF LEALI'I LANDS DOES NOT CONSTITUTE A BREACH OF TRUST

Even if sovereign immunity, waiver, and estoppel were inapplicable, based on the analysis in Section VI(G) below, the sale of ceded lands at Leali'i would not constitute a breach of trust. Therefore, on this basis also, Plaintiffs fail to meet the first prong for the granting of injunctive relief with respect to the sale of Leali'i lands—that they prevail on the merits.

For all of these reasons, Plaintiffs are not entitled to an injunction prohibiting the further sale of Leali'i lands pursuant to the plan for residential development.

VI. ANALYSIS OF REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF PROHIBITING SALE OF CEDED LANDS. INCLUDING LANDS AT LEALI'I, BASED ON ALLEGED ILLEGALITY AND BREACH OF TRUST

A. THE HAWAII SUPREME COURT'S DECISION IN THE EWA MARINA CASE DOES NOT HAVE COLLATERAL ESTOPPEL EFFECT

Defendants argue that based on the Hawaii Supreme Court's November 12, 1998 memorandum opinion in *Trustees of the Office of Hawaiian Affairs* v. *Board of Land & Natural Resources*,[255] Plaintiffs are collaterally estopped from even arguing that the State does not have the power to sell ceded lands.[256]

Pursuant to Rule 35(c) of the Hawaii Rules of Appellate Procedure:

> A memorandum decision ... shall not be cited in any other action or proceeding except when the opinion ... establishes the law of the pending case, res judicata or collateral estoppel...[.]

Res judicata is a common law doctrine which prevents multiplicity of suits and provides a limit to litigation.[257] By "preventing inconsistent decisions," res judicata "encourages reliance on adjudication."[258]

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[255] *See* Ex GGGGGG, Nov. 12, 1998, Mem. Op. in *Ewa Marina* (No. 95-0330-01).

[256] (Sup. Ct. No. 19774) ("*Ewa Marina*"); *See* "[Defendants Proposed] Opinion of the Court, Including [Proposed] Findings of Fact, Conclusions of Law, and Order," filed Dec. 19, 2001, p. 20 *et seq.*

[257] *Kauhane* v. *Acutron Co, Inc.*, 71 Haw. 458, 463, 795 P.2d. 276, 278 (1990) quoted in *State of Hawaii* v. *Magoon*, 75 Haw. at

Collateral estoppel is an aspect of res judicata and precludes relitigation of a fact or issue that was previously determined in a prior suit on a different claim between the same parties or their privies.[259] A "judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided."[260]

Defensive collateral estoppel denies a plaintiff who lost a claim "another opportunity to rehash the claim ... by switching adversaries."[261] The public must know that judicial pronouncements shall be accepted as the "undeniable legal truth."[262] In general, a party to litigation is therefore collaterally estopped from relitigating an issue decided against it in a subsequent suit if

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164, 189, 858 P.2d. 712, 724 (1993); *Bolte* v. *Aits, Inc.*, 60 Haw. 58, 60,587 P.2d. 810, 812 (1978).

[258] *Kauhane*, 71 Haw. at 463, 795 P.2d. at 278.

[259] *Dorrance* v. *Lee*, 90 Haw. 143, 148, 976 P.2d 904, 909 (1999).

[260] *Magoon*, 75 Haw. at 190, 858 P.2d at 725; *Kauhane*, 71 Haw. at 463, 795 P.2d at 278; *Pele Defense Fund*, 73 Haw. at 599, 837 P.2d at 1261; *accord*, *Silver* v. *Queen's Hospital*, 63 Haw. 430,435-36, 629 P.2d 1116 (1981).

[261] *Morneau* v. *Stark Enterp*, 56 Haw. 420, 424, 539 P.2d 472, 476 (1975); *Gomes* v. *Tyau*, 57 Haw. 163, 167, 552 P.2d 640, 643 (1976).

[262] *Ellis* v. *Crockett*, 51 Haw. 45, 56, 451 P.2d. 814, 822 (1969).

three elements exist: (1) the issue decided in the prior adjudication is identical with the one presented in the action at question, 2) there was a "final judgment on the merits" in the prior action and 3) the "party against whom the plea of res judicata is asserted [was] a party or in privity with a party to the prior adjudication."[263] More recently, the Hawaii Supreme Court in *Dorrance* v. *Lee*[264] stated that collateral estoppel also requires that the issue decided in the previous litigation was "essential" to the final judgment.

The *Ewa Marina* decision arose from an appeal to the Hawaii Supreme Court from an administrative appeal filed by OHA. On January 30, 1995, OHA filed an appeal to the Circuit Court of the First Circuit, State of Hawaii, from the Findings of Fact, Conclusions of Law, Decision and Order entered on December 29, 1994 by the BLNR that granted a Conservation District Use Application ("CDUA") and allowed Haseko (Ewa), Inc. ("Haseko") to dredge a 3,000 foot long entrance channel from submerged ceded lands off the Ewa coast for its planned Ewa Marina Development.

OHA argued before the Circuit Court and on appeal to the Hawaii Supreme Court, among other things, that the BLNR's issuance of the CDUA permit was a breach of the State's fiduciary duties under section 5(f) and the "public trust doctrine," and that the issuance of the CDUA permit constituted an improper "disposi-

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[263] *Silver*, 63 Haw. at 436, 629 P.2d at 1121; *Magoon*, 75 Haw. 190-91, 858 P.2d. at 725 quoting *Morneau* 56 Haw. 424, 539 P.2d. at 475.

[264] 90 Haw. at 149.

tion" of public lands.[265] OHA specifically argued that the CDUA permit was a disposition of State land that must comply with Chapter 171 of the Hawaii Revised Statutes.[266] The Hawaii Supreme Court noted that "the actual issue in this case, therefore, is whether the issuance of the CDUA permit is a proper disposition of ceded lands."[267]

In its memorandum opinion deciding the-Ewa-Marina case, the Hawaii Supreme Court adopted the United States Court of Appeals for the Ninth Circuit's 1990 holding in *Price* v. *State of Hawaii*[268] that "the language of section 5(f) declares that the State is to have the power to manage the property and its income in a manner that the constitution and the laws of the State provide. That confers broad authority upon the State."[269] The Supreme Court also concluded that "[i]t would be error to read the words 'public trust' [in § 5(f)] to require that the State adopt any particular method ... of management for the ceded lands. All property held by a state is held upon a 'public trust.' Those words alone do not demand that the a state deal with its property in any particular manner."[270] Specifically with respect to the "disposition" of ceded lands under Section 5(f) of the Admissions Act and the State Constitution, the Supreme Court stated:

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[265] *See* Ex. HHHHHH.

[266] *See* Ex JJJJJJ.

[267] *See* Ex. GGGGGG, at p. 22.

[268] 921 F.2d 950, 955 (9th Cir. 1990).

[269] Ex. GGGGGG, at p. 19.

[270] *Id.*

—"[S]ection 5(f) does not limit the use of the ceded lands themselves to the five purposes, so long as the proceeds from the disposition of these lands are held in trust."[271]

—"The constitution and the laws of the State of Hawaii clearly contemplate the disposition of ceded lands."[272]

—"Pursuant to HRS § 171-18 (1993), 'all proceeds and income from the sale, lease or other disposition of [ceded lands] shall be held as a public trust for [the five purposes enumerated in 5(f)].' This statutory section expressly recognizes the power of the State of Hawaii-to dispose of ceded lands. Additionally, Article XII, section 6 of the Hawaii Constitution states that 'the board of trustees of [OHA] shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands ... including all income and proceeds from that pro rata portion of the ceded lands trust.'"[273]

—"The State ... has the power to dispose of ceded lands."[274]

—"In 1995, the Attorney General correctly opined that the State has the legal authority to sell or dispose of ceded lands."[275]

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[271] Ex. GGGGGG, at p. 21.

[272] *Id.*

[273] *Id.*

[274] *Id.*

> —"In relation to ceded lands, Article XII, § 4, [of the State Constitution] ... reads: 'The [ceded lands] shall be held by the State as a public trust for native Hawaiians and the general public.' 'Article XII, § 4 was added to the [Hawaii] Constitution to expressly recognize the trust purposes and trust beneficiaries of the §(5f) trust, clarifying that the State's trust obligations extend beyond the Hawaiian Home Lands Trust.' This provision had no effect on the State's power to dispose of ceded lands."[276]

Thus, if the decision of the Hawaii Supreme Court in *Ewa Marina* has collateral estoppel effect, the OHA Plaintiffs, at minimum, and the Individual Plaintiffs, if found to be in privity with OHA, would be prohibited from asserting that the State of Hawaii lacks power to sell ceded lands.

Pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure, parties to an appeal may seek reconsideration of an appellate order for any "points of law or fact that the [] party contends the court has overlooked or misapprehended." Apparently due to concerns regarding the potential collateral estoppel effect of *Ewa Marina* on this case, OHA filed a motion for reconsideration on April 6, 1998.[277] In its motion for reconsideration, OHA argued that it did not have an opportunity to litigate the issue of whether the State could sell or dispose of ceded lands, and cited to the 1993 Apology

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[275] *Id.* at fn. 6, *citing* A.G. Op. 95-03.

[276] *Id.* at p. 24.

[277] *See* Ex. 534, OHA's Motion for Reconsideration in *Ewa Marina*.

Resolution, Article XII, Section 4 of the Hawaii State Constitution, and additional legal arguments raised in this litigation.[278]

In its April 15, 1998 Order Denying Motion For Reconsideration, the Hawaii Supreme Court ruled as follows:

> Upon consideration of Appellant The Trustees of the Office of Hawaiian Affairs' motion for reconsideration, it appears that the collateral estoppel effects of our opinion in the instant case are not ripe for determination at the present time and the proper forum for consideration of this issue would be the circuit court in a future case where collateral estoppel is actually raised and litigated. Therefore,
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> IT IS HEREBY ORDERED the motion for reconsideration is denied.[279]

Therefore, this court must determine whether the Ewa Marina case has collateral estoppel effect in this action.

Defendants argue that all elements of collateral estoppel are met here. They correctly allege that there was a "final judgment on the merits" in *Ewa Marina*. They also properly assert that OHA was a party to that case. Moreover, the issue of whether the State could sell or dispose of ceded lands for public purposes was actually litigated.

In addition, the court agrees that the Individual Plaintiffs are privies of OHA for purposes of the collat-

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[278] *See id.* at 3-4.

[279] *See* Ex. 535.

eral estoppel effect of *Ewa Marina*. The definition of privity under Hawaii law "has moved from the conventional and narrowly defined meaning of mutual or successive relationship[s] to the same rights of property to merely a word used to say that the relationship between the one who is a party of record and another is close enough to include that other within the res judicata."[280] One of the public land trust's five purposes is "the betterment of conditions of native Hawaiians," and OHA's purposes include "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians."[281] OHA can only act through its trustees.[282] As native Hawaiians, the. Individual Plaintiffs are beneficiaries of OHA, and are privies of OHA for purposes of any collateral estoppel effect of the *Ewa Marina* case.

Therefore, the general elements for collateral estoppel have been satisfied. Based on two additional factors involved in a collateral estoppel analysis, however, this court concludes that the *Ewa Marina* case does not have collateral estoppel effect.

The first is the additional requirement contained in *Dorrance* v. *Lee* that collateral estoppel requires that the issue decided in the previous litigation be "essential" to the final judgment.[283] The issue of whether the

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[280] *In the Matter of the Dowsett Trust*, 7 Haw. App. 640, 646, 791 P.2d 398, 402 (1990) (internal citations omitted).

[281] H.R.S. Sec. 10-3.

[282] H.R.S. Secs. 10-4 and 10-5.

[283] 90 Haw. at 149.

State has the power to ell ceded lands, which is a primary issue raised by the Plaintiffs in this case, was not "essential" to the final judgment in *Ewa Marina*, which merely decided whether the BLNR could issue a permit to *dredge* submerged ceded lands.

The second additional requirement for applicability of the preclusive effects of collateral estoppel is one reflected in several cases, including *Pele Defense Fund* v. *Paty*,[284] that the plaintiff against whom collateral estoppel is asserted have had "a full and fair opportunity to litigate the relevant issues."[285] Taking judicial notice of the files in the *Ewa Marina* case, which the- court has reviewed, the court cannot conclude that OHA had a "full and fair opportunity to litigate the relevant issues" raised in this case regarding the State's sale of ceded lands. Although arguments regarding breach of trust were raised by OHA in that case, they were not fully briefed and thoroughly argued as they were in this case. In fact, when OHA filed the appeal of the BLNR decision to allow a dredging permit of submerged ceded lands in the *Ewa Marina* case, this lawsuit was already pending, and would have been the natural vehicle to fully litigate the legal questions raised in this lawsuit.

Therefore, the court concludes that *Ewa Marina* does not have collateral estoppel effect on this lawsuit, and that the Plaintiffs are therefore not precluded from obtaining a decision from this court regarding whether the State has the legal power to sell ceded lands, and, if

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[284] 73 Haw. 578, 837 P.2d 1247 (1992), *citing Morneau* v. *Stark Enters*, 56 Haw. 420, 539 P.2d 472 (1975).

[285] *Pele Defense Fund*, 837 P.2d at 1261, *citing Morneau*, 539 P.2d at 474.

so, whether exercise of such a power of sale would constitute a breach of the State's duties to native Hawaiians as trustee of the ceded lands trust.

B. THE POLITICAL QUESTION DOCTRINE AND SOVEREIGN IMMUNITY BAR PLAINTIFFS' REQUEST FOR RELIEF BASED ON ALLEGED ILLEGALITY OF CEDED LAND SALES DUE TO A "CLOUD" ON THE STATE'S TITLE

Having concluded that the *Ewa Marina* case does not have collateral estoppel effect, the court must now reach the merits of Plaintiffs claims. The court must first address whether the State has the power to sell ceded lands and, if so, whether such sales constitute a breach of trust.

Plaintiffs' First Amended Complaint alleges that the sale of ceded lands is illegal based on the illegality of the overthrow of the Kingdom of Hawaii.[286] Plaintiffs argue that this violation of the Law of Nations creates a cloud on the State's current title to the ceded lands. Plaintiffs also argue that developments in the treatment of Native American claims, by analogy, create a claim in favor of native Hawaiians.

The Hawaii Supreme Court has held, however, that the issue of whether the Territory of Hawaii received good title to ceded lands is a non justiciable political question. In *Territory* v. *Kapiolani Estate*,[287] refusing

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[286] *See* First Amended Complaint, filed August 11, 1995, para. 12 through 14.

[287] 18 Haw. 640 (1908); *See also Territory* v. *Puahi*, 18 Haw. 649 (1908).

to recognize a claim disputing the Territory's title to ceded lands, the Supreme Court held:

> The validity of the declaration in the constitution of the Republic of Hawaii, under which the present title is derived, *does not present a judicial question. Even assuming*, but in no way admitting, *that the constitutional declaration was confiscatory in nature, this court has no authority to declare it invalid.* The subsequent derivation of the title by the United States is clear. The position here taken in refusing to regard the defendant's claim that title is otherwise than is fixed by constitutional law as presenting a judicial question is well illustrated in numerous decisions of the United States Supreme Court.[288]

Thus, the "political question doctrine," a principle of justiciability, precludes this court's consideration of the merits of Plaintiffs' claim that the sale of ceded lands is prohibited due to a cloud on the State's title due to the illegality of the overthrow.

In addition, the doctrine of sovereign immunity also precludes this claim. In general, sovereign immunity "precludes any suit against the State without its express consent, which immunity likewise covers state officials acting in their official capacities."[289]

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[288] *Id.* at 645-46. *See also*, *Puahi*, 18 Haw. at 651 (rejecting challenge to the Territory's title on the basis that the question was non justiciable); *and see*, *United States* v. *Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978) (rejecting challenge to the United States's title to public lands as "frivolous.")

[289] *Helela* v. *State*, 49 Haw. 365, 369, 418 P.2d 482, 485 (1966).

Case law has held that sovereign immunity does not bar a suit for injunctive relief to prohibit state officials from acting in an illegal manner.[290] The State of Hawaii has not consented, however, to be sued in a lawsuit contesting the validity of its title to the ceded lands. "It is the law in this jurisdiction that a proceeding against property in which the State of Hawaii has an interest is a suit against the State and cannot be maintained without the consent of the State," so that the State "and its interest in land [are] immune from suit."[291] "If it be made to appear at any stage of the case that the State claims title, the court's jurisdiction over the merits of such claim thereby is ousted under the doctrine of sovereign immunity."[292]

A claim for injunctive and declaratory relief that would have the effect of depriving the State of control over public lands under Hawaii Revised Statutes Chapters 171 and 201E is the "functional equivalent of a quiet title action," and is barred. by sovereign immunity.[293] Looking beyond the pleadings to "examine the

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[290] *See Pele Defense Fund* v. *Paty*, 73 Haw. 578 (1992).

[291] *A.C. Chock, Ltd.* v. *Kaneshiro*, 51 Haw. 87, 88, 451 P.2d 809, 811 (1969) (dismissing mechanics lien naming the State).

[292] *Marks* v. *Ah Nee*, 48 Haw. 92, 94, 395 P.2d 620, 622 (1964).

[293] *See Idaho* v. *Couer D'Alene Tribe*, 521 U.S. 261 (1997) (suit by Couer D'Alene tribe, claiming ownership or, alternatively, a beneficial interest in submerged lands in Lake Couer D'Alene, to enjoin State control over such land was barred by the Eleventh Amendment). Even though the Couer D'Alene Tribe styled its suit as one for declaratory and injunctive relief, sovereign immunity applied because the effect of the relief they sought "is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." *Id.* at 282.

effect" of the suit and "its impact on these special sovereignty interests [of the State]," sovereign-immunity bars Plaintiffs' claims to the extent they seek relief based on an allege cloud on the State's title to ceded lands. Where the "requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters," and "would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory," sovereign immunity applies.[294]

The Plaintiffs cite *State of Hawaii* v. *Zimring*[295] for the proposition that the State has only "naked" title to the ceded lands.[296] *Zimring* does not, however, support Plaintiffs' position regarding illegality of sales of ceded lands. In *Zimring*, the Hawaii Supreme Court held that a lava extension adjacent to private property was "public domain," title to which passed to the State from the federal government pursuant to the Admission Act.[297] In reaching its conclusion, the Supreme Court analyzed the history of public lands in Hawaii. The Court concluded that the Republic quitclaimed "all of its property interests" in public lands to the United States.[298] The Supreme Court found that when the United States stated in the Organic Act that the "pos-

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[294] *Id.*

[295] 58 Haw. 106, 566 P.2d 725 (1977).

[296] *See, e.g.*, OHA Plaintiffs' Trial Memo, filed Nov. 6, 2001, at p. 2.

[297] *Id.* at 123.

[298] *Id.*

session, use and control" of ceded lands (excluding those set aside for federal uses) would remain in the territory until otherwise provided by Congress, the *United States* (not Hawaii) retained "no more than naked title to the public lands."[299]

When Hawaii became a state pursuant to the Admission Act, however, complete title and control passed to the State, subject to the reservation "that any public lands 'set aside' for federal use by act of Congress or by order of the President or the governor of Hawaii prior to Statehood or within five years from admission would remain federal property."[300] Thus, the "naked title" language of *Zimring* does not apply to the title obtained by the State of Hawaii upon admission to the United States.

With respect to rights of native Hawaiians based on analogies to treatment of Native American claims, the Ninth Circuit Court of Appeals has stated, "[n]or can it be said that § 5(f) generally creates a trust which demands the exacting standards of administration that the United States has often imposed on itself when it is dealing with Native Americans."[301] Cases dealing with recognition of Native American claims or fiduciary duties with respect to land or assets are based on federal statutes or treaties that allow such claims, or which set aside such lands or money exclusively for indigenous people pursuant. to specific acts of Congress or the ex-

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[299] *Zimring*, 58 Haw. at 124 *cited in* OHA Plaintiffs' Trial Memo, filed Nov. 6, 2001, at p. 2.

[300] *Id.* at 125.

[301] *Price*, 921 F.2d at 955 *citing Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942).

ecutive branch of the United States government.[302] In addition, it has been held that absent express statutory

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[302] *See, e.g., Cramer* v. *United States*, 261 U.S. 219, 230 (1923) (voiding grant of lands previously occupied by Indians based on language in the initial land patent grant by the government which "excepted ... such lands 'as shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of," where the specific land at issue was "reserved or otherwise disposed of' within the language of the exception in the grant.); *United States* v. *Creek Nation*, 295 U.S. 103 (1935) (affirming award of money damages to the Creek Nation for the negligent taking of lands which had been excluded from its reservation, title to which *Congress* had conveyed to the tribe by treaty and statute); *Seminole Nation* v. *United States*, 316 U.S. 286 (1942) (claim for breach of fiduciary duty against the United States for payments it made to a tribal treasurer that was misappropriating funds initially dismissed for lack of jurisdiction, but allowed after Congress amended the statute allowing for breach of fiduciary claims by Indians); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 22 (1942) (claim for mismanagement of lumber resources under a federal statute allowing Indians to bring claims against the government arising out of a treaty, statute or mismanagement of *Indian* property); *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (claim under 1930 statute requiring the government to pay interest on all funds unless otherwise authorized by law and other statutes requiring the government to invest *Indian* funds in higher rat_ instruments); *Cheyenne-Arapahoe Tribes* v. *United States*, 512 F. 2d 1390 (Ct. Cl. 1975) (statutory claim for breach of fiduciary duty for the Bureau of American Affairs' alleged failure to "maximize the trust income by prudent investment" after it took control of Indian funds); *Menominee Tribe of Indians* v. *United States*, 607 F.2d 1335, 1339, 121 Ct. Cl. 506 (1979), *cert. den.*, 449 U.S. 899 (1980) (vacating district court ruling that Congress violated a "fiduciary" duty to the Menominee Tribe by passing legislation that ended federal supervision over the tribe because Court found that it had no jurisdiction to determine whether Congress breached any fiduciary duty to Indians, but remanding with directions to determine whether the Executive Branch violated any statute or treaty by its acts); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 416 (1980)

authority to do so, courts lack jurisdiction to adjudicate claims to "aboriginal" title to land brought by aborigines.[303] Thus, the recognition of Native American claims also involve political questions.

Therefore, the political question doctrine and sovereign immunity preclude this court from considering Plaintiffs' claims based on international law and Native American law that sales of ceded lands are prohibited due to the illegality of the overthrow of the Kingdom of Hawaii.

(claim by the Sioux Nation for damages under a *statute* Congress passed in 1976 which allowed for the payment of interest on amounts that the United States had paid to the Sioux Nation for lands taken in violation of the Fort Laramie Treaty); *United States* v. *Mitchell*, 463 U.S. 206 (1983) (General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. § 331, *et seq.* did not give Indians a right to sue for mismanagement Indian of trust lands, but Indians could sue under the Tucker Act, 28 U.S.C. § 1491); *Navajo Tribe of Indians* v. *United States*, 9 Cl. Ct. 336 (1986) (statutory claim for alleged breach of duties in the management of tribal forest lands); *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-76 (1937) (affirming dismissal of claim that the United States disposed of lands ceded to it for the "benefit of plaintiffs," without questioning right to dispose of lands).

[303] *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 285 (1955) (holding that "the taking by the United States of 'unrecognized' or 'aboriginal' Indian title is not compensable under the Fifth Amendment," and limiting its award under Sioux Nation "only to instances in which 'Congress by treaty or other agreement has declared that thereafter Indians were to hold lands permanently.")

C. AS CORRECTLY ANALYZED IN ATTORNEY GENERAL OPINION 95-3, THE STATE HAS THE LEGAL AUTHORITY TO SELL CEDED LANDS

On July 17, 1995, then Attorney General Margery S. Bronster responded to an inquiry from then Governor Benjamin J. Cayetano regarding "whether the State has the legal authority to sell or dispose of ceded lands."[304] Although not binding, opinions of the Attorney General are "highly instructive."[305]

In this case, the court agrees with the following analysis of Attorney General Opinion 95-3 regarding the State's legal authority to sell ceded lands:[306]

July 17, 1995

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Executive Chambers
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

Re: Authority to Alienate Public Trust Lands

This responds to your request for our opinion as to whether the State has the legal authority to sell or dispose of ceded lands.

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[304] *See* Ex. LLL, Attorney General Opinion No. 95-3, dated July 17, 1995, re "Authority to Alienate Public Trust Lands."

[305] *Kepoo* v. *Watson*, 87 Haw. 91, at 99, frt. 9, 952 P.2d 379 (1998).

[306] Ex. LLL. It should be noted, however, that page 10 of Attorney General Opinion 95-3 is missing from the exhibit received into evidence.

For the reasons that follow, we are of the opinion that the State may sell or dispose of ceded lands. We note that any proceeds of the sale or disposition must be returned to the trust and held by the State for use for one or more of the five purposes set forth in § 5(f) of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) (the "Admission Act").

In Part I of this opinion, we determine that under the Admission Act and the Constitution the State is authorized to sell ceded lands. In Part II, we conclude that the 1978 amendments to the State Constitution do not alter the State's authority.

I. The Admission Act Authorizes the Sale or Disposition of Public Trust Land.

The term "ceded land" as used in this opinion is synonymous with the phrase "public land and other public property" as defined in § 5(g) of the Admission Act:

> [T]he term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

The United States granted the ceded lands to the State of Hawaii in § 5(b) of the Admission Act. That section, in relevant part, declares:

> (b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' ti-

tle to all the public lands and other public property . . . .

Section 5(f) of the Admission Act imposes a trust upon these lands and appoints the State as the trustee.[1] The section states:

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), *together with the proceeds from the sale or other disposition of any such lands* and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for *the development of farm and home ownership on as widespread a basis as possible* for the making of public improvements, and for the provision of lands for public use. *Such lands, proceeds, and income shall be managed and disposed* of for one or more of the foregoing purposes *in such manner as the constitution and laws of said State may provide*, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or

> denominational school, college, or university. [Emphases added.]

The Admission Act § 5(f) expressly acknowledges that ceded or public trust land may be alienated when it refers to "the proceeds from the sale or other disposition of any such lands."

There is further evidence that alienation of the trust land was contemplated " and permitted under § 5(f); one of the five enumerated purposes for which the public trust land may be used is, "the development of farm and home *ownership* on as widespread a basis as possible." (Emphasis added.)

This Admission Act language is echoed in article XI, § 10 of the State Constitution (previously numbered article X, § 5) which provides:

> The public lands shall be used for the development of farm and home *ownership* on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law. [Emphases added.]

The Hawaii Supreme Court has affirmed that "[t]he language of this section refers expressly to farm and home *ownership* and not leaseholds." *Big Island Small Ranchers Ass'n* v. *State*, 60 Haw. 228, 235, 588 P.2d 430, 435 (1978). The history of the 1950 constitution further reflects that fee ownership was intended. Standing Committee Report No. 78, adopted by the Committee of the Whole, stated:

> The Committee unanimously agreed that for the public good, *fee simple homes and farms* should be made available on as widespread basis as possible, however, it was felt by the Committee that reasonable judgment should be

> exercised in the manner of making the lands available. . . . The thought of the Committee is that the more families are placed as independent *land owners on the public domain*, the more stable the economy of the State will be . . . .

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 233 (1960) (emphases added).

Additionally, § 5(f) mandated that the constitution and the law prescribe the manner in which the State was to manage and dispose of ceded lands. In adopting article XIV, § 8 (now renumbered, and as amended, article)(VI, § 7) "the State affirmatively assume[d] the § 5(f) trust responsibilities." *Pele Defense Fund* v. *Paty*, 73 Haw. 578, 586 n.2, 837 P.2d 1247, 1254 n.2 (1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). That section provided that:

> [A]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation.

Thus, the State Constitution placed the responsibility for compliance with the Admission Act on the legislature.

The legislature carried out this responsibility by enacting Act 32, 1962 Haw. Sess. Laws 95. Section 1 of the act provided, in relevant part:

> By virtue of section 15 of the Statehood Act, a serious question exists as to whether or not Hawaii has any land laws relating to the management and disposition of the public lands.

> It is of immediate importance to the economy and to the people of Hawaii that we adopt a set of laws for the management and disposition of our public lands in accordance with present day needs.

Section 2 of Act 32, codified as chapter 171, Haw. Rev. Stat., contains the provisions for the management and disposition of public lands.[2] Chapter 171 applies to any and all "public lands," including ceded lands or lands the State acquired by other means.[3] Act 32 recognized the uniqueness of the ceded lands in section – 18 of section 2 (codified as Haw. Rev. Stat. 171-18). It prescribed that "all proceeds and income from the sale, lease or other disposition" of ceded lands were to "be held as a public trust." Like section 5(f) of the Admission Act, Haw. Rev. Stat. § 171-18 expressly provides that ceded or public trust land may be alienated. Both the Admission Act and Haw. Rev. Stat. § 171-18 refer to "the proceeds and income from the sale, lease or other disposition" of ceded lands.

Dispositions of ceded lands may also include land exchanges in which the State conveys ceded lands to other parties in exchange for land from those parties. In its definition of ceded lands, the Admission Act deals expressly with land exchanges as a means of disposing of ceded lands.

As noted earlier, § 5(g) of the Admission Act defines "public land and other public property" as:

> the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution-of-annexation approved July 7, 1898 (30 Stat. 750), or *that have been acquired in exchange for lands or properties so ceded.* (Emphasis added.)

Land exchanges, like other types of dispositions, were contemplated by the Legislature when it enacted Act 32, 1962 Haw. Sess. Laws 95. Presently codified as chapter 171, Hawaii Revised Statutes, the statute provides for exchanges of public for private lands at §§ 171-50 and -50.2. Because any such exchange must be made for "substantially equal value" § 171-50(b), the value of the ceded land trust is not diminished by the exchange.

This treatment of land exchanges affecting the trust so as not to diminish the value of the trust is an analogue to Haw. Rev. Stat. § 171-18, which provides that proceeds and income from the sale, lease or other disposition of ceded lands "be held as a public trust." Thus, whether the disposition of the ceded lands results in money or land, the proceeds are subject to the trust and must be held by the State for use for trust purposes.

The Admission Act, pursuant to which the State acquired title to ceded lands, allowed the State to sell, alienate, or otherwise dispose of those lands. The State Constitution and laws enacted thereunder also reflect the State's right to sell.

II. The 1978 Constitutional Amendments Did Not Alter the Express Authority to Alienate Public Trust Land.

No law enacted after the Admission Act has altered the alienability of § 5(f) trust land. We appreciate, however, that the argument has been made that a change in the State Constitution in 1978 altered the law on the issue of alienability.

In 1978, Hawaii amended its constitution to include a specific reference to the public trust established in the Admission Act. Article XII, § 4 provides:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

In article XVI, § 7, referred to by article XII, § 4, the State affirmatively assumes the Admission Act § 5(f) trust provisions, and consequently the trust purposes, powers, and authority. *Pele Defense Fund*, 73 Haw. at 586, n.2, and 601, 837 P.2d at 1254, n.2, and 1262. Article XVI, § 7 now provides:

> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII."

An analysis of the meaning of article XII, § 4 requires consideration of other related provisions of the Constitution, as amended in 1978. "A constitutional provision must be construed in connection with other provisions of the instrument, and also in light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construction . . . ." In re Carter, 16 Haw. 242, 244 (1904). See also Haw. Rev. Stat. § 1-16 (1985); Att'y Gen. Op. No. 83-2 (April 15, 1983).

A companion provision to article XII, 4, which also had its origin in 1978 Constitutional Convention is arti-

cle XII, 6. Section 6 refers to the trust established in article XII, 4 in a manner that leaves no doubt that the ability to alienate public trust land conferred by 5(f) of the Admission Act was recognized as continuing after the 1978 amendments to the constitution. Section 6 states that the Office of Hawaiian Affairs ("OHA") board:

> [S]hall exercise power as provided by law: *to manage and administer the proceeds from the sale or other disposition of the lands*, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, *including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians*; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. [Emphases added.]

This language acknowledges expressly the continued viability of the power, first conferred upon the State by § 5(f) of the Admission Act, to alienate ceded lands.

If the State did not have continuing authority and power to dispose of ceded lands, "proceeds from that pro rata portion" could not be generated. Further, an interpretation which would render the reference to "proceeds" superfluous should not be adopted. *Littleton* v. *State of Hawaii*, 6 Haw. App. 70, 73, 708 P.2d 829, 832 (1985). Therefore, the power and authority to generate proceeds from, or power to alienate, lands held in public trust, exist under article XII, § 4.

Another provision of the Constitution, article XI, § 10, also supports the State's continued authority to alienate ceded lands. Article XI, § 10 of the Hawaii Constitution provides that the "public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law." Although repeal of this provision was proposed in 1978, the repeal was not validly ratified. *Kahalekai* v. *Doi*, 50 Haw. 324, 342, 590 P.2d 543, 555 (1979). Absent valid ratification, the proposed repeal was a nullity. *Id.*; 16 C.J.S. *Constitutional Law* § 14 (1984); 16 Am. Jur. 2d *Constitutional Law* §§ 41 and 44 (1979).

Moreover, the proposed repeal was not intended to diminish the power to alienate the public lands for fee home and farm ownership. In fact, Delegate Anthony Chang emphasized: "[t]his [repeal of article X, § 10] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands would be used." 1 Proceedings of the Constitutional Convention of Hawaii 1978 (hereinafter referred to as "1978 Proceedings"), at 445-46.[5]

The history of article XII, § 4, contains nothing to suggest that the section was intended to override the power to sell or dispose of the public trust land provided for in § 5(f) of the Admission Act.[6] Rather, the history indicates that article. XII, § 4 was intended to reiterate the trust contained in the Admission Act. According to the Standing Comm. Rep., § 4 "recites the trust corpus of section 5(b) and names the two principal beneficiaries established in section 5(f) of the Admission Act - those [who are] native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as

amended, and the general public." Stand. Comm. Rep. No. 59, 1978 Proceedings, at 643-44.7

Courts have recognized that article XII, § 4 must be interpreted by reference to the terms of the Admission Act, § 5(f). According to the Hawaii Supreme Court, "Article XII, § 4 was added to the Hawaii Constitution to expressly recognize the trust purposes and trust beneficiaries of the § 5(f) trust." *Pele Defense Fund* v. *Paty*, 73 Haw. 578, 603, 837 P.2d 1247, 1263 (1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). The Supreme Court wrote: "Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions." *Id.*, 73 Haw. at 605, 837 P.2d at 1264. There can be no "doubt that the provisions of the [Admission] Act must be looked to when we consider the nature and extent of the State's duties and powers." *Price* v. *State of Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990).

The words "public trust" do not require the State to adopt any particular form of management of public lands. "Those words alone do not demand that a State deal with its property in any particular manner . . . . Those words betoken the State's duty to avoid deviating from § 5(0's purpose. They betoken nothing more." *Price*, 921 F.2d at 956.

The phrase "*shall be held* by the State as a public trust" in article XII § 4, does not mean that the State may not sell the trust land. This language is very like the provision in § 5(f) of the Admission Act which says that the lands granted to the State "shall be held by said State as a public trust." Significantly, side by side in § 5(f) with this provision is the language that contemplates proceeds from the sale of the trust land.

The case of *State* v. *Zimring*, 58 Haw. 106, 566 P.2d 725 (1977), describes common law public trust principles that are generally applicable when a state holds land in trust. The court said:

> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

58 Haw. at 121, 566 P.2d at 735.

In view of § 5(f) of the Admission Act, relevant constitutional provisions, and common law public trust principles, we conclude that the State has been and remains empowered to sell trust lands subject to the terms of the trust. This authority was in no way modified by the constitutional amendments made in 1978. In fact, the Constitution, as amended in 1978 refers to proceeds from the sale or disposition of ceded lands with a prospective allocation of such proceeds to OHA.

Very truly yours,

Margery S. Bronster
Attorney General

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[1] Section 5 essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; un-

der the Organic Act, the Territory of Hawaii served as trustee.

[2] Under § 171-13, Haw. Rev. Stat., "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the board may: (1) [d]ispose of public land in fee simple, by lease, lease with option to purchase, license, or permit . . . ." Similarly, § 171-23, Haw. Rev. Stat. reflects that a land patent or deed may be issued "to the purchaser in fee simple of any public land or other land disposable by the board of land and natural resources."

[3] Haw. Rev. Stat. § 171-2 defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner . . . ."

[4] Some questions remain as to whether the electorate approved the addition of the last sentence of article XV, § 7, as proposed by the 1978 Constitutional Convention. *See Kahalekai* v. *Doi*, 60 Haw. 324, 590 P.2d 543 (1979).

[5] The constitutional history reveals that the Constitutional Convention understood that the Admission Act requirements and powers would continue after, and generally be unaffected by, the proposed constitutional amendments. During the debates, Delegate Chang explained the State's authority to manage and dispose of public lands. According to Delegate Change, "[t]he reason that the committee proposal was drafted to delete this portion [article X, § 5] of the Constitution was because of the evolving concept on the use of public land policy now reflects the uses to which the public

lands were suspended to be put in conformance with the Organic Act [sic], and this is the multiple, use concept.

"This [repeal of article X, § 5] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands should be put. And as I stated, this would be in conformance with the conditions set forth in the Organic Act [sic] with regard to public lands. The purposes to which public lands ought to be put under the terms of the Organic Act [sic] are five in number, and farm and home ownership is only one. . . ." 1978 Proceedings at 445-46. Delegate Change subsequently changed his reference to the Organic Act to the Admission Act. Id. at 446.

[6] The electorate was given "[a] brief description of each of the proposed amendments" in an Informational Booklet which was part of the official 1978 ballot. With respect to article XII, sections 4, 5, and 6, the booklet provided: If adopted, this amendment

* sets forth the trust corpus and beneficiaries of the Admission Act.

* establishes an Office of Hawaiian Affairs with an elected board of trustees and provides for an effective date.

There was no statement that any change in the purposes of the § 5(f) trust, or any change in the management or disposition of such public lands subject to § 5(f), was proposed or intended. Such change in management and purposes would represent a fundamental change in the trust terms regarding the use and disposition of public lands which would require that the voters be given specific information that such a result was in-

tended. Otherwise, the ratification would be suspect. *Kahalekai* v. *Doi*, 60 Haw. 324, 590 P.2d 543 (1979).

[7] In explaining the proposed changes to article XII, Delegate Kekoa Kaapu described the § 4 amendment as "a redefinition of the public trust, of those elements in the Admission Act which are of benefit to Hawaiians, by setting forth clearly what those two categories of beneficiaries are to make it more easily handleable to administer -- and that is, that the beneficiaries of the public trust under section 5(f) are in fact the general public and native Hawaiians." 1978 Proceedings, at 458 (1980).

According to Delegate John Waihee, "this proposal does not transfer to the trust any state lands. What is concerned is that section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii . . . . So what the trust would do would be to mandate the section of these revenues from public land which are to be given which are presently mandated by the Admission Act to be held in trust for Hawaiians --would be transferred directly to the new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands . . . . We're not taking away any public lands, we're merely directing some of the revenues that are supposed to go to the Hawaiian people." *Id.* at 462.

D. THE 1993 APOLOGY RESOLUTION AND ACT 359 OF 1993 DO NOT PROHIBIT THE SALE OF CEDED LANDS

The Individual Plaintiffs claim that the 1993 Apology Resolution[307] and Act 359 of 1993[308] constitute changed circumstances that either create a cloud on title or would render any sale of ceded lands a breach of trust.

Through the 1993 Apology Resolution and Act 359 of 1993, the federal and state governments have recognized past injustices to native Hawaiians, and have expressed their support for native Hawaiian sovereignty and reconciliation.[309]

In adopting the Apology Resolution, however, Congress did not create a "claim" to any ceded lands.[310]

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[307] 1993 Apology Resolution, *supra* note 12, Ex. 1

[308] This Act created the HSAC. *See* Section II(A)(4)(c), *supra.*

[309] *Id.*

[310] *See Rice v. Cayetano*, 941 F. Supp. at 1546, n. 24, *rev'd on other grounds*, 528 U.S. 495 (2000) ("Defendants' reliance on the 1993 Apology Bill is misplaced. While the United States expressed its deep regret to the Native Hawaiian people for the federal government's participation in the overthrow of the Kingdom of Hawaii, and pledged to support reconciliation efforts, *that bill did not create any substantive rights.*"); *See, also, Monet v. United States*, Civ. No. 96-0006 (DAE), at p. 8 (D. Haw. Apr. 19, 1996) ("[T]he court has conclusively held ... that the language of the [Apology] Resolution and the legislative history make it absolutely clear that Pub. L. No. 103-150 does not create any substantive legal rights."); *Monet v. Obayashi Corp.*, Civ. No. 96-0006 (HG), at p. 5 (D. Haw. Apr. 25, 1996) ("Contrary to plaintiffs' position, Joint Res. PL 103-150 confers no substantive rights.").

The Senate Report accompanying the 1993 Apology Resolution explicitly provides that its enactment "will not result in any changes in existing law.)[311]

Likewise, the court does not discern any legislative intent from-Act 359 of 1993 that the Legislature intended to create rights that would render the sale of all ceded lands illegal or a breach of trust. The Legislature was undoubtedly aware that just the year before, in 1992, it had passed legislation setting formulas for the calculation of OHA and DHHL's entitlements to sales of ceded lands at Leali'i and Lai'o'pua.[312] In the 1993 legislation, the Legislature did not attempt to countermand its 1992 authorization of the sales of ceded lands for residential development.

Therefore, this argument lacks merit.

E. FURTHERMORE, PURSUANT TO APPLICABLE LAW, SALES OF CEDED LANDS DO NOT NECESSARILY CONSTITUTE A BREACH OF TRUST

1. Hawaii's Public Lands Trust Provides The Legislature With Considerable Discretion With Respect To The Handling Of Ceded Lands

Section 5(f) of the Admission Act specifically provides that the State shall manage and dispose of ceded lands "in such manner as the constitution and laws of the State may provide." As the *Yamasaki* Court

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[311] S. Rep. No. 103-126 (1993). Senator Bill Richardson of New Mexico noted that the Federal Apology Resolution "does not infer any new rights to native Hawaiians. It is an apology that is long overdue."

[312] Acts 317 & 318 of 1992. *See* Section II(E), *supra*.

stated, the Hawaii Constitution adopting the Admission Act placed the "onus of compliance with the Admission Act on the Legislature."[313] The Hawaii State Constitution provides that trust obligations under the Public Lands Trust "shall be complied with by appropriate legislation."[314]

The legislature's authority is explained in Attorney General Opinion 95-3, in Section VI(C), above. As stated by the Hawaii Supreme Court in *OHA v. State*:

> ...[W]e would do a disservice to all parties involved if we did not Acknowledge that the State's obligation to native Hawaiians is firmly established in our constitution. *How the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust.* *See* Haw. Const. art. XVI, section symbol 7. Although *this court cannot and will not judicially legislate a means to give effect to the constitutional rights of native Hawaiians*, we will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution.[315] [Emphasis added.)

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[313] 69 Haw. at 161, 737 P.2d at 450.

[314] Art. XVI, Sec. 7.

[315] 96 Haw. at 401, 31 P.3d at 913.

Thus, the Hawaii State Legislature has considerable discretion with respect to the handling of the ceded lands trust.

2. Although General Trust Principles Are Also Applicable To The Public Lands Trust, Such Principles Are Not Necessarily Breached By All Sales Of Ceded Lands

According to the Hawaii Supreme Court in *Pele Defense Fund v. Paty*, "the conduct of government as trustee is measured by the same strict standards applicable to private trustees."[316] The Hawaii Supreme Court noted that, similar to the Hawaiian Home Lands Trust, the State owes a high standard of fiduciary duty to the beneficiaries of the ceded lands trust.[317]

For the reasons stated in Attorney General Opinion 95-3, however, quoted in Section VI(C) above, sales of ceded lands are not prohibited by applicable constitutional and statutory law, and, generally, do not constitute a breach of trust as long as general trust obligations are met. As long as the State does not otherwise breach the high standards applicable to it as trustee, there would be no breach of trust.[318] Because there are no proposed sales of ceded lands currently under consideration, for the reasons stated in Section VII below, it is not appropriate for the court to attempt to determine whether any specific proposed future sale of ceded lands would constitute a breach of trust.

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[316] 73 Haw. at 604-05, fn. 18.

[317] *Id.* The Hawaii Supreme Court referred to various general trust duties.

[318] *Id.*

F. WITH RESPECT TO THE SALE OF LEALI'I LANDS, IN ALTERNATIVE, BECAUSE SUCH SALE IS FOR A PERMITTED PUBLIC PURPOSE, THERE IS NO BREACH OF TRUST

As explained in the factual findings in Section II(E) above, the sale of ceded lands at Leali'i was authorized by the Hawaii State Legislature based on a perceived and actual need for residential development in West Maui.[319] Residential development is clearly a permitted purpose for the use of ceded lands.[320]

Plaintiffs would have the court second guess the Legislature's findings of a public need for residential development in West Maui. Because the Legislature has been provided with considerable discretion with respect to the ceded lands,[321] and for reasons of "justiciability" explained in Section VII below, it is not appropriate for this court to second guess the Legislature's determinations.

Therefore, in the alternative, because the sale of ceded lands at Leali'i was and is for a permitted public purpose, there is no breach of trust.

G. BECAUSE PLAINTIFFS HAVE NOT PREVAILED ON THE MERITS, THE COURT DOES NOT ADDRESS THE ISSUES OF BALANCE OF IRREPARABLE HARM AND PUBLIC INTEREST

As explained in Section IV(A) above, injunctive relief is a remedy, not a cause of action. For injunctive relief to issue on Plaintiffs' claim seeking a permanent

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[319] *See* Section II(E), *supra*.

[320] *See* Section II(A)(2)-(3), *supra*.

[321] *See generally*, Sections VI(C) & VI(E)(1), *supra*.

injunction based on the allegation that sales of ceded lands constitute a breach of trust, Plaintiffs must first prevail on the merits of the underlying cause of action. The court only reaches the issues of "balance of irreparable harm" and "public interest in support" if the Plaintiffs prevail on the merits.

For the reasons stated above, Plaintiffs have failed to prevail on the merits of their allegations that the sale of ceded lands is illegal or would constitute a breach of trust. Accordingly, the court does not reach the "irreparable harm" and "public interest" issues.

VII. PRINCIPLES OF JUSTICIABILITY PROHIBIT THE COURT FROM ADDRESSING ISSUES OF WHETHER FUTURE PROPOSALS FOR THE SALE OF CEDED LANDS WOULD CONSTITUTE BREACHES OF TRUST AND ORDERING A MORATORIUM ON ALL SALES OF CEDED LANDS

Finally, the court must address Plaintiffs' post-trial alternative request that the court impose a moratorium (or issue a preliminary injunction) on all sales of ceded lands pending resolution of native Hawaiian claims. By "resolution of native Hawaiian claims" Plaintiffs appear to mean a complete resolution of native Hawaiian claims to the ceded lands, including possible transfer of lands to a new sovereign native Hawaiian nation or government.[322]

As explained in Section II(A)(4)(c), the federal and state governments have recognized the need for establishment of a sovereign Hawaiian government with its

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[322] *See* OHA's "Proposed Opinion of the Court, Including Findings of Fact, Conclusions of Law," filed Dec. 19, 2001, p. 70, & "Individual Plaintiffs' Closing Argument," filed Dec. 17, 2001, p. 56.

own land base. Article XII, Section 6 of the Hawaii State Constitution and H.R.S. Sections 10-5(2)[323] and 6K-9,[324] which provides for the island of Kaho'olawe to be transferred "to the sovereign native Hawaiian entity upon its recognition of the United States and the State of Hawaii," specifically envision transfer of lands to a native Hawaiian government or OHA, on behalf of native Hawaiians.

In addition, as explained in II(A)(4)(c), movement is taking place at both the federal and state levels toward creation and recognition of a sovereign Hawaiian nation or government.

Thus, Plaintiffs assert that it would be a breach of trust for the State of Hawaii to sell additional ceded lands while native Hawaiian claims are pending, and request a moratorium on all sales of ceded lands pending resolution of native Hawaiian claims.

As has been explained, however, sales of ceded lands do not necessarily violate the Admission Act, the Hawaii State Constitution, and Hawaii law. Moreover, no additional proposals for the sale of ceded lands are pending.

This court must, therefore, consider whether principles of justiciability prohibit it from delving into issues concerning potential future breaches of trust. As stated in *OHA* v. *Yamasaki*, "justiciability" refers to a court's obligation to "carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion

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[323] *See* Section 11(3), *supra*.

[324] [no footnote text]

into areas committed to other branches of government."[325] As further explained in *Yamasaki*:

> . . . The proper balance between the coordinate branches [the legislative, the executive, and the judicial] is a delicate one; and [t]he question of how far a judicial inquiry should range has been the most extensive and central debate in constitutional law throughout our country's history. . . .
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> . . .
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> . . . When litigation seems premature or subject to unresolved contingencies, the courts speak of the justiciability question in terms of 'ripeness.' . . . [W]hen resolution of the litigation threatens confrontation with the other parts of the government, the courts speak in terms of 'political question.'[326]
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> . . .
>
> When confronted with an abstract or hypothetical question, we have addressed the problem in terms of a prohibition against rendering "advisory opinions[.]"[327]

The doctrine of justiciability requires courts, "*even in the absence of constitutional restrictions, [to] still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their own power before acting, especially when there may be an intrusion*

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[325] *Yamasaki*, 69 Haw. at 169, 737 P.2d at 455.

[326] *Yamasaki*, 69 Haw. at 168-69, 737 P.2d at 454-55.

[327] *Yamasaki*, 69 Haw. at 171, 737 P.2d at 456.

into areas committed to other branches of government.[328] The concern "about infringing upon the authority of our elected brethren becomes particularly acute whenever a challenge to legislation predates efforts to implement its provisions."[329] Therefore, the "established, general practice of the courts has been to reserve judgment upon a law pending concrete executive action to carry out its policies into effect."[330]

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[328] *Yamasaki*, 69 Haw. at 170, 737 P.2d at 456 [emphasis added].

[329] *Bremner* v. *City & County of Honolulu*, 96 Haw. 134, 144, 28 P.2d 350, 360 (Haw. App. 2001) *Bremner*, 96 Haw. at 144, 28 P.2d at 360. "Prudential rules of judicial self-governance founded in concern about the proper -- and properly limited -- role of courts in a democratic society, ... considerations flowing from our coequal and coexistent system of government, dictate that [the judiciary] accord those charged with ... administering our laws a reasonable opportunity to ... enforce them in a manner that produces a lawful result." *Id.* Because "to do otherwise risks divesting the other branches of government of their fundamental constitutional prerogatives." *Id.* (affirming dismissal of action under HRS § 632-1 for declaratory relief invalidating County zoning ordinance as not ripe until there is actual implementation of a specific development project).

[330] *Id.* The Hawaii Supreme Court stated:

> The need to avoid premature adjudication supports a definition of a "dispute" that requires more than a "difference of opinion" as to policy. The rationale underlying the ripeness doctrine and the traditional reluctance of courts to apply injunctive and declaratory remedies to administrative determinations is "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative

The justiciability" principles of "ripeness," "the political question doctrine," and the mandate against "advisory opinions" all prohibit this court from addressing issues of whether future proposals for the sale of ceded lands would constitute breaches of trust, and thereby ordering a moratorium on all sales of ceded lands.

With respect to "ripeness," *Pele Defense Fund* v. *Paty*[331] makes clear that beneficiaries of the ceded lands trust have standing to bring suit to enjoin dispositions of ceded lands that would constitute breaches of trust.[332] No evidence was presented, however, of any proposed sales of ceded lands other than at Leali'i. In fact, the evidence suggests that the State has been following a self imposed moratorium on the sales of additional ceded lands.[333] Proposed sales could constitute breaches of trust,[334] but for the reasons stated above,

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decision has been formalized and its effects felt in a concrete way by the challenging parties."

Id.; See also, Grace Bus. Dev. Corp. v. *Kamikawa*, 92 Haw. 608, 612, 994 P.2d 540, 544 (2000) (affirming dismissal of action for injunctive and declaratory relief regarding liability for general excise and transient accommodations taxes as not ripe without formal administrative decision by director) *quoting Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967).

[331] 73 Haw. 578, 837 P.2d 1247 (1992).

[332] "Thus, we hold that PDF, whose members are beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions governing the public lands trust." 73 Haw. 578, 837 P.2d at 1264 (1992).

[333] *See* Section II(C), *supra.*

[334] *See* Section VI(H), *supra.*

not all sales of ceded lands would violate the ceded lands trust.[335]

The case of *Branson School Dist. RE-82* v. *Romer*[336] is analogous to the case at hand. Plaintiffs in *Branson* challenged changes to Colorado's constitution that, *inter alia*, prohibited sale of up to 300,000 acres of trust land granted to Colorado under its enabling act[337] and dedicated to the sole benefit of public schools. Plaintiffs claimed the provisions conflicted with the State's fiduciary obligations because they were intended to achieve ends other than the benefit of the schools. The court refused to speculate as to the possible future violations of fiduciary duty, stating, "[a]lthough we believe it is possible that an ultimate conflict of interest may some day arrive for the land board, we also recognize that it may not."[338]

Plaintiffs' preemptive challenge to the sale of any and all ceded lands presents-the court with the same issue as the *Branson* court. It is possible that a future proposed sale of ceded lands in the future could present a breach of fiduciary duty. But like the court in *Branson*, the "ripeness doctrine" prevents the court from speculating as to such future events.

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[335] *See* Sections VI(C)-(E), *supra*.

[336] 161 F.3d 619, 626 (10th Cir. 1998).

[337] Most states after the original 13 colonies were admitted to the union by enabling acts that included grants of federal land to be held in trust for various purposes, usually including support of schools. *See Dept. of State Lands* v. *Pettibone*, 216 Mont. 361, 368-69, 702 P.2d 948, 952 (1985).

[338] 161 F.3d at 639.

The Hawaii Supreme Court also admonishes against consideration of breach of public trust claims that ask the court "to settle 'political questions' which must be resolved by the political branches of government."[339] "[J]udicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review,"[340] and is "founded in concern about the proper--and properly limited--role of courts in a democratic society."[341]

The Hawaii Supreme Court has long recognized the "inappropriateness of judicial intrusion into matters which concern the political branch of government,"[342] and that "[t]oo often, courts in their zeal to safeguard their prerogatives overlook the pitfalls of their own trespass on legislative functions."[343] A case should be dismissed "for non justiciability on the ground of a political question's presence" if *any one* of the following "formulations is inextricable from the case at bar":

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the

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[339] *Yamasaki*, 69 Haw. 154, 737 P.2d 445, *cert. denied*, 484 U.S. 898 (1987).

[340] *United States* v. *Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J. dissenting).

[341] *Bremner* v. *City & County of Hawaii*, 96 Haw. 134, 139, *cert. denied*, 96 Haw. 346 (2001).

[342] *Bulgo* v. *County of Maui*, 50 Haw. 51, 56, 430 P.2d 321, 325 (1967).

[343] *Koike* v. *Bd. of Water Supply*, 44 Haw. 100, 103, 352 P.2d 835, 843 (1960) *quoted in Yamasaki*, 69 Haw. at 172, 737 P.2d at 456-57.

> issue to a coordinate political government; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[344]

This case clearly involves "a textually demonstrable constitutional commitment of the issue to a coordinate political government,"[345] implicates the concern of an "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branch[] of government," and the possible "potentiality of embarrassment from multifarious pronouncements by various departments on one question." Thus, the "political question" doctrine applies.

Finally, the prohibition against the rendering of "advisory opinions" also prohibit this court from attempting to address whether a possible proposed future sale of ceded lands would constitute a breach of trust and ordering a moratorium on that basis. Again, no evidence was presented of any proposed sales of ceded lands other than at Leali' i. In actuality, the evi-

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[344] *Baker* v. *Carr*, 369 U.S. 186, 217 (1982) *quoted in Yamasaki*, 69 Haw. at 169 (emph. added).

[345] *See* Section VI(E)(1), *supra*.

dence suggests that the State has been following a self imposed moratorium on the sales of additional ceded lands.[346] Proposed sales could constitute breaches of trust,[347] but for the reasons stated above, not all sales of ceded lands would violate the ceded lands trust.[348]

Accordingly, principles of justiciability preclude this court from considering issues of whether future proposals for the sale of ceded lands would constitute a breach of trust and ordering a moratorium on all sales of ceded lands.

VIII. CONCLUSIONS AND ORDERS

This opinion has addressed the first three counts of Plaintiffs' First Amended Complaint of August 11, 1995. Count I requested an injunction on all sales of ceded lands, alleging that trust obligations under Article XII, Section 4 of the State Constitution prohibit the sale of fee title to ceded lands.[349] Based on the same allegation, Count II requested that the court "stop the sale of ceded lands" at Leali'i to third persons.[350] Count III requested that the court issue a declaratory ruling "that (a) any conveyance to a third party violates the Hawaii State Constitution and the Admissions Act, (b) and/or any sale of Ceded Lands does not directly or in-

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[346] *See* Section 11(C), *supra*.

[347] *See* Section VI(H), *supra*.

[348] *See* Sections VI(C)-(E), *supra*.

[349] *See* First Amended Complaint, filed August 11, 1995, at para. 27-33.

[350] *Id.* at para. 39.

directly release or limit claims of Native Hawaiians to those lands.[351]

In Counts IV and V, Plaintiffs challenge the process by which the market value of ceded lands at Leali'i were valued for purposes of compensating OHA.[352] These counts were bifurcated for later determination and not at issue in this trial.[353]

A. CONCLUSIONS

With respect to the proposed residential development at Leali'i on Maui, the court concludes that principles of sovereign immunity, waiver, and estoppel bar Plaintiffs' request for injunctive relief. In the alternative, the court concludes that the State would not be in breach of fiduciary duties owed to native Hawaiians as trustee of the ceded lands trust by proceeding with this development.

With respect to the sale of ceded lands in general, although Congress, the Hawaii State Legislature, and the judiciary have all recognized the illegality of the overthrow of the Kingdom of Hawaii and historical injustices toward native Hawaiians, the political question doctrine and sovereign immunity prohibit consideration of Plaintiffs' allegation of a cloud on the State's title to ceded lands based on these historical injustices.

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[351] *Id.* at para. 10.

[352] *See id.* at para. 44-46.

[353] *See* Order Denying in Part and Granting in Part the . . . Plaintiffs' Motion to Bifurcate Trial, or . . . to Continue Trial, entered September 22, 1997.

Based on the Admission Act, the Hawaii State Constitution, Hawaii statutes, and binding judicial precedent, the State of Hawaii, as trustee of the ceded lands trust of the Hawaii State Constitution, continues to possess the legal authority and power to sell ceded lands for public purposes. This authority has not been changed by Congress's 1993 Apology Resolution or recent State legislative enactments.

The court fully appreciates the importance of the 'aina to the Native Hawaiian People and recognizes the distinct possibility of the creation and recognition of a sovereign Hawaiian government. The court also recognizes that the State, as trustee of the ceded lands trust, owes a high standard of fiduciary duty to the beneficiaries of the ceded lands trust.

The judiciary has repeatedly recognized, however, that the Admission Act and the Hawaii State Constitution expressly place primary responsibility for decisions regarding ceded lands in the legislative branch of government. Moreover, other than the proposed residential development at Leali'i, there is no evidence of any additional proposed sales of ceded lands. Therefore, principles of justiciability, which include the prohibition against consideration of issues not ripe for review, the admonition against the rendering of advisory opinions, and the policy of providing due deference to co-equal branches of government, preclude the court from considering whether a possible future proposed sale of ceded lands would constitute a breach of the high fiduciary duty owed by the State to native Hawaiians as beneficiaries of the ceded lands trust.

At this point, the following concluding comments of the Supreme Court of Hawaii in *OHA* v. *State* bear repeating:

> ... [W]e would do a disservice to all parties involved if we did not acknowledge that the State's obligation to native Hawaiians is firmly established in our constitution. How the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, § 7. Although this court cannot and will not judicially legislate a means to give effect to the constitutional rights of native Hawaiians, we will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution. . . [354]

Resolution of native Hawaiian claims to ceded lands would indeed be consonant with H.R.S. Section 5-7.5, which provides:

> **[§5-7.5] "Aloha Spirit".** (a) "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "Aloha", the following unuhi laula loa may be used:
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> "Akahai", meaning kindness to be expressed with tenderness;

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[354] 96 Haw. at 401.

"Lokahi", meaning unity, to be expressed with harmony;

"Oluolu", meaning agreeable, to be expressed with pleasantness;

"Haahaa", meaning humility, to be expressed with modesty;

"Ahonui", meaning patience, to be expressed with perseverance.

These are traits of character that express the charm, warmth and sincerity of Hawaii's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. "Aloha" is more than a word of greeting or farewell or a salutation. "Aloha" means mutual regard and affection and extends warmth in caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.

(b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit".

Finally, resolution of native Hawaiian claims to ceded lands would also surely be consonant with H.R.S.

Section 5-9, which adopts the following as the State motto:

"Ua mau ke ea o ka aina i ka pono."[355]

B. ORDERS

Based on the findings of fact and conclusions of law above, the court orders as follows:

1. That judgment enter in favor of all Defendants against all Plaintiffs on Count I of Plaintiffs' First Amended Complaint requesting an injunction on all sales of ceded lands.

2. That judgment enter in favor of all Defendants against all Plaintiffs on Count II of Plaintiffs' First Amended Complaint requesting an injunction on the sale of ceded lands at Leali'i to third persons.

3. That judgment enter in favor of all Defendants against all Plaintiffs on Count III of Plaintiffs' First Amended Complaint requesting a declaratory ruling that (a) any conveyance to a third party violates the Hawaii State Constitution and the Admissions Act, (b) and/or any sale of Ceded Lands does not directly or indirectly release or limit claims of Native Hawaiians to those lands.

Counsel for the OHA Plaintiffs is to coordinate scheduling of a status conference with the court to discuss scheduling for bifurcated Counts IV and V, dealing with valuation of the Leali'i lands.

DATED: Honolulu, Hawaii, Dec. 5, 2002

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[355] Pursuant to H.R.S. §5-9, this is translated into English to mean "The life of the land is perpetuated in righteousness."

/s/ Sabrina S. McKenna
JUDGE OF THE ABOVE-
ENTITLED COURT

NOTICE OF ENTRY

Notice of given of the entry of the foregoing Opinion of the Court to the following through hand-delivery:

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DATED: Honolulu, Hawaii, Dec. 5, 2002

/s/
CLERK OF THE ABOVE-
ENTITLED COURT

APPENDIX

Supreme Court, U.S.
FILED
FEB 3 - 2009
OFFICE OF THE CLERK

No. 07-1372

IN THE

Supreme Court of the United States

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

CORRECTED PETITION APPENDIX A

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APPENDIX A

SUPREME COURT OF HAWAI'I

No. 25570

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,
Plaintiffs-Appellants,

v.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, ET AL.,
Defendants-Appellees.

Jan. 31, 2008

MOON, C.J., LEVINSON, NAKAYAMA, and ACOBA, JJ.; and Circuit Judge CHAN, in Place of DUFFY, J., Recused.

Opinion of the Court by MOON, C.J.

Two sets of plaintiffs-appellants-(1) the Office of Hawaiian Affairs (OHA) and its Board of Trustees [hereinafter, collectively, the OHA plaintiffs] and (2) Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'a'ai'ai, and Keoki Maka Kamaka Ki'ili [hereinafter, collectively, the individual plaintiffs and, together with the OHA plaintiffs, collectively, the plaintiffs] appeal from the Circuit Court of the First Circuit's January 31, 2003 final judgment,[1] entered pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule

[1] The Honorable Sabrina S. McKenna presiding.

54(b) (2007).[2] Following a jury-waived trial, the trial court found in favor of defendants-appellees State of Hawai'i (State), the Housing and Community Development Corporation of Hawai'i, and the executive director and members of the board of directors of the HCDCH,[3] as well as Linda Lingle, in her capacity as Governor of the State [hereinafter, collectively, the defendants] and against the plaintiffs.

Briefly stated, the instant action arises from the defendants' efforts in the mid-1990s to transfer certain parcels of ceded lands to private entrepreneurs for the purpose of residential development. On August 11, 1995, the plaintiffs filed suit, seeking an injunction against the defendants from selling or otherwise transferring to third parties two specific parcels of ceded lands located on the islands of Maui and Hawai'i,[4] as

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[2] HRCP Rule 54(b) provides in relevant part that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[3] Donald K.W. Lau is the executive director of HCDCH, and the board of directors includes chairperson, Wesley R. Segawa, and members Nadine K. Nakamura, Kurt H. Mitchell, Don Fujimoto, Allan Los Banos, Jr., Susan Chandler, Craig Hirai, Ronald S. Lim, and Bradley J. Mossman.

[4] The plaintiffs filed suit before the parcel on the island of Hawai'i (the Big Island) was transferred. It appears that, at some point, the Big Island parcel [hereinafter, also referred to as the La'i'opua parcel] was transferred to the Department of Hawaiian Homelands (DHHL), which transfer is not specifically challenged

well as any ceded lands from the public lands trust. Alternatively, the plaintiffs sought a declaration that the State was not authorized to alienate ceded lands from the public lands trust or, if the trial court ruled the State was so authorized, a declaration that (2) such alienation would not limit the claims of native Hawaiians to the ceded lands.

On December 5, 2002, the trial court ruled in favor of the defendants, concluding that the plaintiffs' claims were barred by the doctrines of: (1) sovereign immunity; (2) waiver and estoppel; and (3) justiciability-specifically, political question, ripeness, and the mandate against advisory opinions. Nevertheless, the trial court also concluded that the State had the express authority to alienate ceded lands from the public lands trust. An HRCP Rule 54(b) judgment was, thereafter, entered on January 31, 2003, and the plaintiffs appealed.

On appeal, both sets of plaintiffs challenge the aforementioned determinations made by the trial court. Additionally, the OHA plaintiffs assert that the trial court erred in making several evidentiary rulings.

For the reasons discussed *infra*, we vacate the January 31, 2003 judgment and remand this case to the circuit court with instructions to issue an order granting the plaintiffs' request for an injunction against the defendants from selling or otherwise transferring to third parties (1) the parcel of ceded land on Maui and (2) any ceded lands from the public lands trust until the

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by the plaintiffs. Accordingly, other than a few references to the La'i'opua parcel in this opinion, the disposition of the Big Island parcel is not specifically addressed. *See also infra* note 11.

claims of the native Hawaiians to the ceded lands has been resolved.

I. *BACKGROUND*

A. *Historical Background*

The issues presented in this case have their genesis in the historical events that led to the overthrow of the Kingdom of Hawai'i, the surrender of 1.8 million acres of crown, government, and public lands to the United States, the admission of Hawai'i as a state of the Union, and the creation of OHA and the public lands trust. *See Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 340-42, 133 P.3d 767, 769-71 (2006) [hereinafter, *OHA II*]; *Office of Hawaiian Affairs v. State*, 96 Hawai'i 388, 389-92, 31 P.3d 901, 902-05 (2001) [hereinafter, *OHA I*]; *Pele Defense Fund v. Paty*, 73 Haw. 578, 585-87, 837 P.2d 1247, 1254-55 (1992); and *Trs. of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 159-65, 737 P.2d 446, 449-53 (1987), *cert. denied*, 484 U.S. 898, 108 S. Ct. 234, 98 L. Ed. 2d 192 (1987); *see also Rice v. Cayetano*, 528 U.S. 495, 501, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

> As a condition of its admission into the Union, the State of Hawai'i agreed to *hold certain lands granted to the State by the United States in a public land trust for five purposes*[.] *See* Admission Act of March 18, 1959, Pub.L. No. 86-3, § 5, 73 Stat. 4, *reprinted in*, [Hawai'i Revised Statutes (HRS), vol. 1 at § 5 of the Admissions Act].

OHA I, 96 Hawai'i at 390, 31 P.3d at 903 (emphasis added). The aforementioned five purposes are specifically delineated in section 5(f) of the Admission Act, which provides in relevant part:

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust *[(1)] for the support of the public schools and [(2)] other public educational institutions, [(3)] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*[5] *[(4)] for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and [(5)] for the provision of lands for public use.* Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

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[5] The Hawaiian Homes Commission Act was enacted by the United States Congress (Congress) to set aside over 200,000 acres of ceded lands for exclusive homesteading by native Hawaiians. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). As a condition of statehood, the United States required the State to adopt the act as a provision of the state constitution, *see* Hawai'i Const. art. XI, § 2 (1959) (renumbered art. XII, § 2 (1978)); *see also Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982) (detailing the purpose of the Hawaiian Homes Commission Act and the creation of the Commission).

(Emphasis added.) The management and administration of the ceded lands subject to the section 5(f) trust, *i.e.*, the public lands trust, is vested in the Department of Land and Natural Resources (DLNR), pursuant to HRS § 171-3 (Supp.2006). *See also Pele Defense Fund*, 73 Haw. at 586-87, 837 P.2d at 1254. * * *

> In 1978, the people of Hawai'i clarified the State's trust obligation to native Hawaiians during a Constitutional Convention, as set forth in various provisions of the Hawai'i Constitution, including article XII, sections 4 through 6, ... wherein OHA was created and charged with managing proceeds derived from the ceded lands and designated for the benefit of native Hawaiians. Additionally, article XVI, section 7 of the Hawai'i Constitution requires the State to enact legislation regarding its trust obligations. Thus, in 1979, legislation was enacted that set forth the purposes of OHA and described the powers and duties of the trustees.... 1979 Haw. Sess. L. Act 196, § 2 at 398-99, § 8 at 406 (codified at HRS chapter 10)[.] In 1980, the legislature amended HRS chapter 10

Although the Hawaiian Homes Commission Act defines the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," HRS, vol. 1 at § 201(7) of the Hawaiian Homes Commission Act, for the purposes of this opinion, we use the term to mean "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Pub. L. No. 103-150, 107 Stat. 1510 (1993).

> by adding HRS § 10-13.5, which provided that "twenty per cent of all *funds* derived from the public land trust shall be expended by OHA for the purposes of this chapter." ...1980 Haw. Sess. L. Act 273, § 1 at 525.[6]

OHA II, 110 Hawai'i at 340-41, 133 P.3d at 769-70 (citations, original brackets, and ellipsis omitted) (emphasis in original).[7]

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[6] Although not pertinent to the instant appeal, we concluded, in *Yamasaki*, that the construction of the term "funds," as used in HRS § 10-13.5, "provide[d] no judicially discoverable and manageable standards for resolving the disputes[, *i.e.*, whether OHA was entitled to (1) a portion of damages received by the State for illegal mining of sand from public land and (2) a pro rata share of income and proceeds from sales, leases, or other dispositions of certain public lands,] and [that the disputes] cannot be decided without initial policy determinations of a kind clearly for nonjudicial discretion." 69 Haw. at 173, 737 P.2d at 457 (citation, internal quotation marks, and original brackets omitted). Consequently, the legislature enacted Act 304, amending HRS § 10-13.5 by essentially substituting "incomes" for "funds" and defining the term "revenue." 1990 Haw. Sess. L. Act 304, §§ 3, 7 at 948, 951; HRS §§ 10-13.5 (1993), 10-2 (1993). However, in *OHA I*, we invalidated and effectively repealed Act 304 as conflicting with federal law. 96 Hawai'i at 399, 31 P.3d at 912.

[7] We observe that the trial court found that, "[i]n recent years, there have been discussions and movement toward the creation of a sovereign Hawaiian government, and this movement has received both state and federal recognition." Some scholars dispute that this movement has been of recent inception, stating instead that, "[e]ver since the illegal overthrow and annexation, the native people of Hawai'i-identified as 'Kanaka Maoli,' 'Native Hawaiians' or 'Hawaiians'– have struggled to regain their culture, recover their lands and restore their sovereign nation." Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of Native Hawaiian People*, 10-JUL Haw. B.J. 63, 63 (2006) (footnote omitted).

Moreover, in 1993, the year that marked the one-hundredth anniversary of the overthrow of the Kingdom of Hawai'i, both houses of Congress passed the *Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii* [hereinafter, the Apology Resolution], which was signed into law by then-President Bill Clinton on November 23, 1993 as Public Law No. 103-150, 107

The trial court further found that "various Hawaiian groups support [ ] different forms of sovereignty." However, as observed by one scholar, "[u]ltimately, [n]ative Hawaiians seek return of [the ceded lands] from both the state and federal governments. How such lands would be cared for and managed, who would have jurisdiction over them, and what rights [n]ative Hawaiians could exercise upon them are crucial aspects of [n]ative Hawaiian self-governance and sovereignty." *Native Hawaiian Rights Handbook*, 40 (Melody Kapilialoha MacKenzie, ed., 1991).

Additionally, we note that the trial court found that the federal legislation commonly referred to as the "Akaka Bill"

> was passed out of the Senate Committee on Indian Affairs on September 21, 2001.... The Committee Report on the Akaka Bill explains that its purpose "is to authorize a process for the reorganization of a[n]ative Hawaiian government and to provide for the recognition of the [n]ative Hawaiian government by the United States for the purpose of carrying on a government-to-government relationship."
>
> The Akaka Bill, if enacted[,] ... provides that the federal government is authorized to negotiate with the State and the reorganized [n]ative Hawaiian government for a transfer of land and resources to a [n]ative Hawaiian government. The [n]ative Hawaiian government created by [the Akaka Bill] would thus have a land base and resources and a status similar to that over other native peoples in the United States. The Committee Report to [the Akaka Bill] explains that "it is the Committee's intent that the references to 'land, resources, and assets dedicated to [n]ative Hawaiian use' include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands."
>
> The legislation is still pending before the United States Congress.

(Footnotes omitted.) We take judicial notice that the current version of the Akaka Bill was passed by the House of Representatives on October 24, 2007.

Stat. 1510 (1993). The Apology Resolution provides, in its entirety, as follows:

> Joint Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to [n]ative Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.
>
> Whereas, prior to the arrival of the first Europeans in 1778, the [n]ative Hawaiian people lived in a highly organized self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;
>
> Whereas[,] a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;
>
> Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;
>
> Whereas[,] the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Missions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850;
>
> Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the

"United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;

Whereas, in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;

Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendents of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;

Whereas[,] the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the [n]ative Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;

Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement

yielding her authority to the United States Government rather than to the Provisional Government:

> I[,] Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
>
> *Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives* and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.
>
> Done at Honolulu this 17th day of January, A.D. 1893.;

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani

would have failed for lack of popular support and insufficient arms;

Whereas[,] on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

Whereas, the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government;

Whereas, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission;

Whereas, in a message to Congress on December 18, 1893, *President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war,* committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;

Whereas[,] President Cleveland further concluded that *a "substantial wrong has thus been done which a due regard for our national char-*

acter as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy;

Whereas[,] the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States;

Whereas[,] the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred to in this Resolution as the "Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy;

Whereas[,] the Committee and its chairman, Senator John Morgan, conducted hearings in Washington, D.C., from December 27, 1893, through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii;

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation;

Whereas, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was

forced by representatives of the Republic of Hawaii to officially abdicate her throne;

Whereas, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland;

Whereas, on July 7, 1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

Whereas, *the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the [n]ative Hawaiian people of Hawaii or their sovereign government;*[8]

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[8] As this court stated in *OHA I*:

> In addition to its sovereignty, the Republic "ceded and transferred to the United States the absolute fee and ownership of all public, Government, or Crown lands belonging to the Government of the Hawaiian Islands together with every right and appurtenance thereunto appertaining." *Yamasaki*, 69 Haw. at 159, 737 P.2d at 449. Following annexation and until 1959, Hawaii's seat of power was vested in a Territorial Government. *See* Organic Act § 3, Act of April 30, 1990, c. 339, 31 Stat. 141, *reprinted in* [HRS, vol. 1 at §§] 43, 44 [of the Organic Act] (establishing the government of the Territory of Hawai'i).

96 Hawai'i at 389-90, 31 P.3d at 902-03.

Whereas[,] the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;

Whereas[,] the Newlands Resolution also specified that treaties existing between Hawaii and foreign nations were to immediately cease and be replaced by United States treaties with such nations;

Whereas[,] the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government;

Whereas[,] *the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum*;

Whereas, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship with the United States;

Whereas, on August 21, 1959, Hawaii became the 50th State of the United States;

Whereas[,] *the health and well-being of the [n]ative Hawaiian people is intrinsically tied to their deep feelings and attachment to the land*;

Whereas[,] the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastat-

ing to the population and to the health and well-being of the Hawaiian people; * * *

Whereas[,] *the [n]ative Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions;*

Whereas, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the [n]ative Hawaiians in the Hawaiian and the American societies;

Whereas[,] the Eighteenth General Synod of the United Church of Christ in recognition of the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the [n]ative Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the [n]ative Hawaiians; and

Whereas[,] *it is proper and timely for the Congress* on the occasion of the impending one hundredth anniversary of the event, *to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express deep regret to the [n]ative Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church*

of Christ with [n]ative Hawaiians: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United State of American in Congress assembled,

SECTION 1. *ACKNOWLEDGEMENT AND APOLOGY.*

The Congress—

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, *acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the [n]ative Hawaiian people;*

(2) recognizes and commends the efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with [n]ative Hawaiians;

(3) *apologizes to [n]ative Hawaiians* on behalf of the people of the United States *for the overthrow of the Kingdom of Hawaii on January 17, 1893* with the participation of agents and citizens of the United States, *and the deprivation of the rights of [n]ative Hawaiians to self-determination;*

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, *in order to provide a proper foundation for reconciliation between the United States and the [n]ative Hawaiian people;* and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the [n]ative Hawaiian people.

SEC[TION] 2. DEFINITIONS.

As used in this Joint Resolution, the term "[n]ative Hawaiian" means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

SEC[TION] 3. DISCLAIMER.

Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

Approved November 23, 1993.

Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphases added) (internal quotation marks omitted).

B. *Factual Background*

In 1987, the legislature, in an effort to remedy the problem of the "critical shortage of safe and sanitary housing units which are affordable to lower income residents of the State[,]" established the Housing Finance and Development Corporation (HFDC)[9] via its

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[9] In 1997, the legislature consolidated HFDC with the Hawai'i Housing Authority and the rental housing trust fund into the Housing and Community Development Corporation of Hawaii (HCDCH). 1997 Haw. Sess. L. Act 350, § 1 at 1010-11; HRS chap-

enactment of HRS chapter 201E. 1987 Haw. Sess. L. Act 337, § 15 at 1045; HRS §§ 201E-1 and -3 (1993). HFDC was authorized to, *inter alia*, develop

> fee simple or leasehold property, construct dwelling units thereon, including condominiums, planned units, and cluster developments, and sell, lease, or rent or cause to be leased or rented, at the lowest possible price to qualified residents, nonprofit organizations, or government agencies, with an eligible developer or in its own behalf, either:
>
> > (1) Fully completed dwelling units with the appropriate interest in the land on which the dwelling unit is located; or
> >
> > (2) Units which are substantially complete and habitable with the appropriate interest in the land on which the dwelling unit is located; or
> >
> > (3) The land with site improvements (other than the dwelling unit) either partially or fully developed.

HRS § 201E-201(a) (1993). Consequently, that same year, 1987, the HFDC began to examine areas in the State that had a "critical shortage

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ter 201G (2001). However, the legislature, in 2006, divided HCDCH into two separate agencies-the Hawai'i Housing Finance and Development Corporation and the Hawai'i Public Housing Authority. *See* 2006 Haw. Sess. L. Act 180, § 2 at 709; 2007 Haw. Sess. L. Act 249, § 2 at 777-806 (codified in HRS chapters 201H and 356D). Nevertheless, inasmuch as the instant action commenced prior to the aforementioned legislative changes, we continue to utilize "HFDC," as do the parties, throughout this opinion.

of housing" and selected two potential sites-(1) Leiali'i in West Maui and (2) La'i'opua in North Kona,[10] both of which were comprised of ceded lands[11]—for the development of housing projects.

After conducting feasibility studies of the potential sites, the HFDC filed a petition with the Land Use Commission (LUC) in December 1989, seeking to reclassify the Leiali'i parcel from agricultural to urban use. At a public hearing on April 10, 1990, OHA, through its Land and Natural Resources Officer, gave oral testimony recommending conditional approval of the petition. On May 18, 1990, the LUC granted the petition, reclassifying the property for urban use. Thereafter, HFDC began a residential housing development project for the parcel. As the "Master Developer" for the Leiali'i project, HFDC was responsible for providing the major infrastructure, *i.e.*, roadways, lighting poles, and sewer hook-ups, needed for the residential development. HFDC contracted with a private developer to build the houses.

In 1992, the legislature enacted Act 318 (codified as HRS § 10-13.6 (1993)) that set forth a formula to compensate OHA for the "villages of Leiali'i, Maui and villages of La'i'opua, Hawai'i" that were to be conveyed from DLNR to HFDC. HRS § 10-13.6(e) (Supp. 2007);

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[10] As stated *supra* note 5, other than a few references to the La'i'opua parcel in this opinion, the transfer of said parcel is not specifically challenged by the plaintiffs. Moreover, the parties' briefs and arguments focus primarily on the Leiali'i parcel and the ceded lands in general.

[11] The Leiali'i parcel was part of the former crown lands subject to subsection 5(b) of the Admission Act.

see also 1992 Haw. Sess. L. Act 318, § 10 at 1016-17. According to Act 318's formula, OHA was to be compensated twenty per cent of the fair market value of the subject lands. HRS § 10-13.6(a). As a result, OHA and DLNR each retained an appraiser to determine the fair market value of the Leiali'i parcel.

In November 1993, Congress adopted the Apology Resolution, quoted fully *supra* and discussed more fully *infra*, wherein it expressly recognized, *inter alia*, that: (1) the overthrow of the Kingdom of Hawai'i was illegal; (2) the taking of crown, government, and public lands of the Kingdom was without consent or compensation; and (3) "the indigenous Hawaiian people never directly relinquished their claims ... over their national lands to the United States." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510. Congress also formally and publicly apologized to native Hawaiians on behalf of the United States for the overthrow and the deprivation of native Hawaiians' rights to self-determination. *Id.* Thereafter and as a result of the adoption of the Apology Resolution, OHA demanded, based on the advice of attorney William Meheula, that a disclaimer be included as a part of any acceptance of funds from the sale so as to preserve any native Hawaiian claims to ownership of the ceded lands, of which the Leiali'i parcel was a part.

In October 1994, HFDC declined to honor OHA's requested disclaimer because "to do so would place a cloud on [the] title, rendering title insurance unavailable to buyers in the Leali'i [sic] project." Thereafter, on November 4, 1994, "DLNR transferred about 500 acres of ceded lands" at Leiali'i to HFDC for the consideration of $1.00. HFDC transmitted to OHA a check in the amount of $5,573,604.40 as OHA's entitlement in accordance with Act 318. Based on advice from then-

OHA counsel Earl Anzai that the Apology Resolution created a cloud on the title of the ceded lands, OHA refused to accept the check. The plaintiffs thereafter filed suit in November 1994.

Subsequent to the filing of the plaintiffs' lawsuit, the HFDC made a policy decision to stop work on the project. By that time, all of the roadways, utilities, lighting poles, and sewer hookups had been completed, including some landscaping work. As of December 1994, HFDC estimated it had already invested $31 million into the Leiali'i project.

C. *Procedural History*

1. The Complaint and Pretrial Motions

On August 11, 1995, the plaintiffs filed an amended complaint (First Amended Complaint), seeking injunctive and, alternatively, declaratory relief.[12] The plaintiffs requested: (1) an injunction against all sales of ceded lands (Count I); (2) an injunction to specifically bar the sale of the Leiali'i parcel (Count II); and, alternatively, (3) a declaratory judgment that "(a) any conveyance to a third-party violates the Hawai'i State Constitution and the Admission Act, and/or (b) any sale of ceded lands does not directly or indirectly release or limit claims of [n]ative Hawaiians to those lands"

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[12] Initially, the plaintiffs filed separate complaints. On November 4, 1994, the OHA plaintiffs filed a complaint in the Circuit Court of the First Circuit. On November 9, 1994, the individual plaintiffs filed a complaint in the Circuit Court of the Second Circuit. Upon the filing of the First Amended Complaint in August 1995, the individual plaintiffs and allegations pertaining to their claims were added to those of the OHA plaintiffs in the First Circuit Court action.

(Count III).[13] The plaintiffs alleged that they would suffer irreparable harm if the defendants were allowed to transfer ceded lands to third-parties inasmuch as "alienation of the land to a third-party would erode the ceded lands trust and the entitlements of the native Hawaiian people." In other words, the plaintiffs alleged that an injunction was proper because, in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust inasmuch as such transfers would be "without regard for the claims of Hawaiians to those lands" to whom the State, as trustee, owes a fiduciary duty.

2. The Trial and the Trial Court's Written Decision

A jury-waived trial commenced on November 19, 2001. At trial, the plaintiffs adduced evidence regarding the events that surrounded the transfer of the Leiali'i parcel, the importance of the land to the native Hawaiians, analogies to Native American property rights, and the developing body of international law that favors the rights of indigenous people to traditional lands. The defendants primarily adduced evidence that the State was authorized to alienate ceded lands from the public lands trust. Additionally, the defendants argued that the plaintiffs were collaterally estopped "from even arguing that the State does not have the power to sell [the ceded lands]" based on the unpublished decision in *Trustees of the Office of Hawaiian*

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[13] In their First Amended Complaint, the plaintiffs asserted two other alternative claims that addressed valuation issues concerning the Leiali'i parcel (Counts IV and V). However, these counts were bifurcated from the case for later determination and are not at issue in this appeal. Counts IV and V are currently stayed pending this appeal.

Affairs v. Board of Land and Natural Resources, No. 19774, 87 Hawai'i 471, 959 P.2d 841 (Haw. Mar.12, 1998) (mem.) [hereinafter, *Ewa Marina*],[14] wherein this court held that the State, as ceded lands trustee, did not breach its duties by granting a dredge permit for submerged lands to a private party, discussed more fully *infra*.

On December 5, 2002, the trial court issued a 105-page written decision, entitled "Opinion of the Court" [hereinafter, the written decision]. As discussed more fully infra, the trial court ruled that, although Ewa Marina did not collaterally estop the plaintiffs from bringing their claims, such claims were barred by the doctrines of: (1) sovereign immunity; (2) waiver and estoppel; and (3) justiciability-specifically, political question, ripeness, and the mandate against advisory opinions. Notwithstanding the above rulings, the trial court also concluded that the State had the express authority to alienate ceded lands from the public lands trust.

On December 13, 2002, the plaintiffs filed a motion for HRCP Rule 54(b) certification or, in the alternative, for leave to file an interlocutory appeal, which was granted. The trial court, on January 31, 2003, filed its HRCP Rule 54(b) judgment in favor of the defendants. Both sets of plaintiffs separately filed timely notices of appeal on February 3, 2003.

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[14] As correctly cited by the trial court, Hawai'i Rules of Appellate Procedure (HRAP) Rule 35(c) (2007) prohibits citation to an unpublished memorandum opinion, "except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel[.]"

II. *STANDARDS OF REVIEW*

A. *Findings of Fact*

> The [trial court's findings of fact] are reviewed on appeal under the "clearly erroneous" standard. A [finding of fact] is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Estate of Klink ex rel. Klink v. State, 113 Hawai'i 332, 351, 152 P.3d 504, 523 (2007) (citations, internal quotation marks, original brackets, and ellipses omitted) (format altered).

B. *Conclusions of Law*

> This court reviews the [trial court's conclusions of law] de novo. A [conclusion of law] is not binding upon an appellate court and is freely reviewable for its correctness. Moreover, a [conclusion of law] that is supported by the [trial court's finding of facts] and that reflects an application of the correct rule of law will not be overturned.

Hui Kako'o Aina Ho'opulapula v. Bd. of Land & Natural Res., 112 Hawai'i 28, 38, 143 P.3d 1230, 1240 (2006) (citations, internal quotation marks, and original brackets omitted).

III. *DISCUSSION*

As previously stated, the plaintiffs seek to enjoin the defendants from selling or otherwise transferring the Leiali'i parcel to third parties and selling or otherwise transferring to third parties any of the ceded lands in general until a determination of the native Hawaiians' claims to the ceded lands is made. Alternatively, the plaintiffs seek a declaration that the State is not authorized to alienate ceded lands from the public lands trust or, if the trial court ruled that the State is so authorized, a declaration that such alienation would not limit the claims of native Hawaiians to the ceded lands. At the heart of the plaintiffs' claims, before the trial court and on appeal, is the Apology Resolution. The plaintiffs essentially believe that the title to the ceded lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished their claims over their ancestral territory and that, therefore, the defendants have a "fiduciary obligation to protect the corpus of the [p]ublic [l]ands [t]rust until an appropriate settlement is reached between native Hawaiians and the State."

Specifically, the plaintiffs argue that the trial court erred in concluding that: (1) the doctrine of sovereign immunity barred consideration of the plaintiffs' claims; (2) the defenses of waiver and estoppel barred the plaintiffs' requests for injunctive and declaratory relief with respect to the sale of the Leiali'i parcel; (3) the State's transfer of the Leiali'i parcel did not breach-and any future transfer of ceded lands would not breach-the State's fiduciary duties as trustee of the public lands trust of which the ceded lands are a part; and (4) the doctrine of political question barred the plaintiffs' requests for injunctive and declaratory relief. Additionally, the OHA plaintiffs assert that the trial court erred

in: (1) determining that their claim for injunctive relief with regard to the future sale of ceded lands in general was barred by the ripeness doctrine; and (2) making several evidentiary rulings.

Preliminarily, we believe it appropriate to first examine the language of the Apology Resolution inasmuch as the plaintiffs' current claim for injunctive relief is, as more fully described *infra*, based largely upon the Apology Resolution, which the defendants believe is inapplicable. We also believe it appropriate to examine related state legislation enacted around the same time that Congress adopted the Apology Resolution. In our view, this preliminary examination is critical to an understanding of the plaintiffs' claim for injunctive relief.

A. *The Apology Resolution and Related State Legislation*

The plaintiffs' claims for injunctive relief and, alternatively, for declaratory relief, are based on their belief that the "recognition in[, inter alia, the Apology Resolution] of the illegality of the transfer of lands and the ongoing reconciliation and negotiation process dramatically reinforces the State's fiduciary obligation to protect the corpus of the [p]ublic [l]ands [t]rust until an appropriate settlement is reached." Specifically, the OHA plaintiffs argue that the "Congressional recognition of illegality, and its accompanying call for a 'reconciliation' through a process now underway, has changed the legal landscape and restructured the rights and obligations of the State." The OHA plaintiffs further assert that

> the failure of the Apology Resolution to complete the process of settling [n]ative Hawaiian claims does not undercut its significance *in rec-*

> *ognizing the bases for [the plaintiffs'] claims....* As the [trial c]ourt explained, the Apology Resolution "confirms the factual foundation for the claims that previously had been asserted."

(Emphasis added.) Additionally, the OHA plaintiffs maintain that the "Apology Resolution by itself does not require the State to turn over the lands to the [n]ative Hawaiian people, but it puts the State on notice that it must carefully preserve these lands so that a subsequent transfer can take place when the political branches reach an appropriate resolution of this dispute."

The defendants admit that the Apology Resolution "posits that the overthrow was illegal and that the [c]eded [l]ands were transferred without compensation." However, relying on the disclaimer language contained therein, the defendants assert that "nothing in the Apology Resolution serves as a settlement of claims." Additionally, the defendants maintain that the Apology Resolution's "historical statements provide no guideline as to what remedy, if any, is appropriate."

The trial court, in analyzing the effect of the Apology Resolution on the plaintiffs' claims, stated:

> The Apology Resolution apologizes for the overthrow of the Kingdom of Hawai'i on January 17, 1893, with the participation of agents and citizens of the United States, and for the deprivation of the inherent rights of native Hawaiians to self-determination and sovereignty. It also supports, recognizes, and commends reconciliation efforts of the State of Hawai'i with native Hawaiians. *Congress concluded in this enactment of the Apology Resolution, which is binding upon this court, that*

> *the overthrow of the Kingdom of Hawai'i was in violation of treaties between the Kingdom and the United States and of international law, that it could not have been accomplished without the assistance of U.S. agents, and that the subsequent "cession" of these lands to the United States in 1898 was "without the consent of or compensation to the [n]ative Hawaiian people of Hawai'i or their sovereign government[.]"*
>
> ....
>
> Congress also expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i in order to provide a proper foundation for reconciliation between the United States and the [n]ative Hawaiian [p]eople, and urged the President of the United States to also acknowledge the ramifications and to support reconciliation efforts.
>
> *Although, by its terms, the 1993 Apology Resolution does not itself "serve as a settlement of any claims against the United States," or "result in any changes in existing law,"* [S. Rep. No. 103-123 (1993) at 35,] *or itself create a claim, right, or cause of action, [Rice v. Cayetano,* 941 F. Supp. 1529, 1546 n. 24 (D.Haw.1996), *rev'd on other grounds,* 528 U.S. 495 [120 S. Ct. 1044, 145 L. Ed. 2d 1007] (2000),] *it confirms the factual foundation for claims that previously had been asserted.*

(Emphases added.) (Footnotes omitted.)

As previously stated, the Apology Resolution was adopted by both the House and the Senate, signed by then-President Clinton on November 23, 1993, and des-

ignated as Public Law No. 103-150. Generally, when a joint resolution-such as the one at issue in this case-has emerged from legislative deliberations and proceedings, it is treated as law. *Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666, 50 S. Ct. 444, 74 L. Ed. 1098 (1930). Consequently, the rules applicable to statutory interpretation are also applicable to the Apology Resolution. Norman J. Singer, *Statutes and Statutory Construction* § 29:8 (6th ed. 2002); 82 C.J.S. *Statutes* § 306 (2007).

It is well-settled that,

> [w]hen construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And *we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.*

Coon v. City & County of Honolulu, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (emphasis added) (citation omitted). Additionally, "the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." *Keliipuleole v. Wilson*, 85 Hawai'i 217, 222, 941 P.2d 300, 305 (1997) (internal brackets and citations omitted). In other words, "a rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable[.]" *Id.* at 221-22, 941 P.2d at 304-05 (internal brackets and citation omitted). Moreover,

> [i]t is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and

> that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute.

Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) (citations omitted).

As previously quoted, the Apology Resolution states in relevant part:

> Whereas[,] *the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the [n]ative Hawaiian people of Hawaii or their sovereign government;*
>
> ...;
>
> Whereas[,] *the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;*
>
> ...;
>
> Whereas[,] *the health and well-being of the [n]ative Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;*
>
> ...; [and]
>
> Whereas[,] *the [n]ative Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with*

> *their own spiritual and traditional beliefs, customs, practices, language, and social institutions [.]*

Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphases added). Based on a plain reading of the above passages, we believe Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations. Equally clear is Congress's "express[ed] ... commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to *provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people." *Id.* We agree with the OHA plaintiffs that the "Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people[.]" In our view, the Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims.

The defendants place great reliance on the Apology Resolution's disclaimer that "[n]othing in [the resolution] is intended to serve as a settlement of any claims against the United States." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510. In so doing, they essentially maintain that the plaintiffs are precluded from using the language contained therein to establish or support a claim for the return of the ceded lands. When reading the disclaimer language—as we must—"in the context of the entire [Apology Resolution] and construfing] it in a manner consistent with its purpose," *Coon*, 98 Hawai'i at 245, 47 P.3d at 360, the disclaimer

provision dictates only that the Apology Resolution itself does not constitute a settlement of any of the unrelinquished claims to the ceded lands; in other words, it does not bestow upon native Hawaiians any *ownership interest* in the ceded lands. As we have stated, the Apology Resolution recognizes, *inter alia*, that native Hawaiians (1) never "directly relinquished their claims to ... their national lands to the United States" and (2) "are determined to preserve, develop and transmit to future generations their ancestral territory." If we were to determine, as the defendants appear to urge, that the disclaimer bars the plaintiffs from relying upon the Apology Resolution—a public law—in pursuing what the resolution clearly recognizes—their unrelinquished claims to the ceded lands,—we would be violating one of the cardinal rules of statutory construction, namely, that this court is bound "to give effect to all parts of a statute" so that "no clause, sentence, or word shall be construed as superfluous, void, or insignificant." *Camara*, 67 Haw. at 215, 685 P.2d at 797. Subscribing to the defendants' reading of the disclaimer would render superfluous the Apology Resolution's acknowledgment of the plaintiffs' unrelinquished claims to the ceded lands. In fact, given the Apology Resolution's clear contemplation of future reconciliation, i.e., settlement, it is not surprising that Congress would include the aforementioned disclaimer after having clearly acknowledged the illegality of the overthrow, the existence of the native Hawaiians' unrelinquished claims to the ceded lands, their deep feelings and attachment to those lands, and their determination to pursue their claims. Clearly, the Apology Resolution is not *per se* a *settlement* of claims, but serves as the *foundation* (or starting point) for reconciliation, includ-

ing the future settlement of the plaintiffs' unrelinquished claims.

Such interpretation is supported by the October 23, 2000 report, issued by the United States Departments of Interior and Justice (the Departments), entitled "From Mauka to Makai: The River of Justice Must Flow Freely."[15] As indicated by the trial court, the principal recommendation of the report states:

> It is evident from the documentation, statements, and views received during the reconciliation process undertaken by [the Departments] pursuant to [the Apology Resolution], that [n]ative Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. *As [a] matter of justice and equity, this report recommends that [n]ative Hawaiian people should have self-determination over their own affairs within the framework of*

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[15] In March 1999, Senator Daniel K. Akaka requested Secretary of the Interior Bruce Babbitt and Attorney General Janet Reno designate officials from their respective Departments whose task would be "to commence the reconciliation process." John Berry, Assistant Secretary, and Mark Van Norman, Director of the Office of Tribal Justice for the Department of Justice were so designated and commenced public consultations in Hawai'i in December 1999. Over forty hours of public statements were heard, and the public consultation process ended in two days of formal hearings on O'ahu. The Departments' report "contains recommendations [(including a 'proposed plan of action')] with respect to the continuation of the reconciliation process and should be read as merely the next step, as the United States and [n]ative Hawaiians move forward in further dialogue."

> *[f]ederal law*, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of [n]ative Hawaiians as an indigenous people within our nation through legislation, administrative action, and policy statements. *To safeguard and enhance [n]ative Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation* to clarify [n]ative Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative [n]ative Hawaiian governing body.

(Format altered.) (Emphases added.)

The above interpretation is also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution-specifically, Acts 354, 359, 329, and 340. Act 354, entitled "A Bill for an Act Relating to Hawaiian Sovereignty," stated in pertinent part that:

> On January 16, 1893, John L. Stevens, American minister in Hawai'i and friend of those supporting the annexation of Hawai'i to the United States, ordered the United States marines to invade Honolulu under the pretext of protecting American citizens and their property. Stevens thereafter recognized a new provisional government even before Queen Liliuokalani surrendered. The actions by the annexationists were condemned by President Cleveland's special envoy and the President himself. When President Cleveland refused to submit a treaty

of annexation to the Senate, the new provisional government established the Republic of Hawai'i which lasted until annexation in 1898. Sixty-one years later, Hawai'i became a state.

Until the provisional government was recognized by John L. Stevens, the Kingdom of Hawai'i was recognized as an independent nation by the United States, France, and Great Britain. Many native Hawaiians and others view the overthrow of 1893 and subsequent actions by the United States, such as supporting establishment of the provisional government and later the Republic of Hawai'i, the designation of the crown and government lands as public lands, annexation, and the ceding of the public lands to the federal government without the consent of native Hawaiians, as illegal. *Because the actions taken by the United States were viewed as illegal and done without the consent of native Hawaiians, many native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned* and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American peoples.

The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.

1993 Haw. Sess. L. Act 354, § 1 at 999-1000 (emphases added). In Act 359, also entitled "A Bill for an Act Relating to Hawaiian Sovereignty," the legislature made findings similar to those expressed in the Apology Resolution. 1993 Haw. Sess. L. Act 359, §§ 1-2 at 1009-11. The stated purpose of Act 359 was to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." 1993 Haw. Sess. L. Act 359, § 2 at 1010. The legislature established the Hawaiian Sovereignty Advisory Commission "to advise the legislature in carrying out the purposes of [the] Act." *Id.*,§ 4 at 1011. In enacting Acts 354 and 359, the legislature recognized that "the indigenous people of Hawai'i were denied ... their lands," 1993 Haw. Sess. L. Act 359, § 1(9) at 1010, and contemplated further action by the legislature to "to tak[e] steps to promote the restoration of the rights and dignity of native Hawaiians." 1993 Haw. Sess. L. Act 354, § 1 at 1000.

In 1997, the legislature enacted Act 329. 1997 Haw. Sess. L. Act 329, § 1 at 956-58. Act 329, which attempted to clarify "the proper management and disposition of the lands subject to the public land[s] trust and the proceeds and income therefrom, and to effectuate article XII, section 6 of the Hawai'i Constitution," stated that:

> The legislature finds that the events of history relating to Hawai'i and [n]ative Hawaiians, including those set forth in [the Apology Resolution] continue to contribute today to a deep sense of injustice among many [n]ative Hawaiians and others. *The legislature recognizes that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly ac-*

> *knowledges the past while moving into Hawaii's future.*
>
> The legislature further finds that over the last few decades, *the people of Hawai'i through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation.* Foremost among these achievements have been the creation of the [O]ffice of Hawaiian [A]ffairs and the allocation by legislative action to the [O]ffice of Hawaiian [A]ffairs of substantial funds out of a portion of the public land[s] trust established by section 5(f) of the Admission Act. The overriding purpose of this Act is to continue this momentum, through further executive and legislative action in conjunction with the people of Hawai'i, toward a comprehensive, just, and lasting resolution.

1997 Haw. Sess. L. Act 329, § 1 at 956 (emphases added).

Additionally, we observe that, in 1993, the legislature found that "the island of Kaho'olawe[16] is of significant cultural and historic importance to the native people of Hawai'i," 1992 Haw. Sess. L. Act 340, § 1 at 803, and dictated that:

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[16] The island of Kaho'olawe was used by the United States "as a military target range since 1941." 1993 Haw. Sess. L. Act 340, § 1 at 803.

> In 1990, the bombing and shelling of the island was halted by Congress and the President of the United States. A federal commission,

> Upon ... return [of Kaho'olawe] to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public lands trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai'i.

Id. at § 2 at 806 (codified as HRS chapter 6K).

It is well-settled that native Hawaiian beneficiaries of the ceded lands trust have a "right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust." *Pele Defense Fund*, 73 Haw. at 601, 837 P.2d at 1262. Moreover, we have previously indicated in an analogous case dealing with the Hawaiian Homes Commission Act that the State, as trustee, "must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries." *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168. In describing the scope of the State's relevant fiduciary duties, this court, in *Ahuna*, analogized such duties to the fiduciary duties of the United States to native Americans by quoting, with approval, the words of the United States Supreme Court and stated:

> Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, *[the Gov-*

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known as the Kaho'olawe Island Conveyance Commission, was created by Congress to determine the terms of conveyance of the island to the State of Hawai'i.

Id.

> *ernment] has charged itself with moral obligations of the highest responsibility and trust.* Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, *should therefore be judged by the most exacting fiduciary standards.*

Id. at 339, 640 P.2d at 1169 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942)) (brackets and emphases in original) (format altered). In *Ahuna*, we held that "[t]he use of the term 'most exacting fiduciary standards' imports the notion that [this] court will strictly scrutinize the actions of the government." *Id.* at 339, 640 P.2d at 1169. Moreover, we observed that "the nature of the trust obligations of the [State] toward beneficiaries ... may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans[.]" *Id.* at 339, 640 P.2d at 1168. In particular, we cited three specific trust duties applicable to the State as trustee: (1) "the obligation ... to administer the trust solely in the interest of the beneficiary"; (2) the obligation that the trustee "deal impartially when there is more than one beneficiary"; and (3) the "obligation to use reasonable skill and care to make trust property productive[.]"[17] *Id.* at 340, 640 P.2d at 1169-70 (citations omitted).

As native Hawaiians, the individual plaintiffs are clearly beneficiaries of the ceded lands trust. Additionally, OHA, which is charged "with managing proceeds

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[17] In so doing, we stated that the "reasonable prudent person standard applies to protecting and caring for the [trust] property[.]" *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169.

derived from the ceded lands and designated for the benefit of native Hawaiians," *OHA II*, 110 Hawai'i at 341, 133 P.3d at 770 (citation omitted), can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust. The State, as trustee, is under an obligation to "administer the trust solely in the interest of the beneficiary" and to "deal impartially when there is more than one beneficiary." *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169-70 (citations omitted). As previously discussed, the Apology Resolution and the aforementioned related state legislation clearly contemplate that native Hawaiians (1) "never directly relinquished their claims to ... their national lands to the United States," and (2) "are determined to preserve, develop and transmit to future generations their ancestral territory." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510. As such, we believe and, therefore, hold that the Apology Resolution and related state legislation, discussed *supra*, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved. Such duty is consistent with the State's "obligation to use reasonable skill and care" in managing the public lands trust and the Ahuna court's declaration that the State's conduct "should ... be judged by the most exacting fiduciary standards." Ahuna, 64 Haw. at 339, 640 P.2d at 1169 (citations and emphasis omitted).

Keeping the aforementioned discussion and holding in mind, we now turn to examine the issues raised by the parties in this appeal-the first of which is the defendants' contention that the plaintiffs' claim for injunctive relief is barred by the doctrine of collateral estoppel.

B. *Collateral Estoppel*

Relying on *Ewa Marina*, the defendants assert, as they did before the trial court, that the plaintiffs are collaterally estopped from relitigating whether the State has the power to alienate ceded lands from the public lands trust. The OHA plaintiffs maintain that the trial court addressed the issue and "correctly rejected the argument presented by the [defendants]."

In *Ewa Marina*, the plaintiffs-OHA, Save Ewa Beach Ohana, and two individual plaintiffs-challenged the Board of Land and Natural Resources' (BLNR) issuance of a conservation district use area (CDUA) permit to Haseko, Inc. (Haseko). *Ewa Marina*, slip op. at 2. "Haseko submitted a CDUA permit application to the BLNR[,] seeking a permit to dredge a channel through state-owned submerged lands. The purpose of this permit was to allow Haseko to construct a 1400-slip marina as part of the proposed 'Ewa Marina development project." *Id.* BLNR conditionally granted Haseko's application for the CDUA permit on December 29, 1994. *Id.* at 8. The plaintiffs timely appealed the decision and order of the BLNR to the circuit court, which affirmed the decision of the BLNR. *Id.* at 8-9. The plaintiffs then appealed to this court, arguing, *inter alia*, that "the issuance of the permit violated the fiduciary obligations of the State of Hawai'i under section 5(f) of the ... Admission Act and the public trust doctrine" and that "issuance of the permit constitute[d] an improper disposition of public lands." *Id.* at 9.

This court upheld the decisions of the circuit court and BLNR, reasoning that "section 5(f) does not limit the use of the ceded lands themselves to the five purposes[ ] so long as the proceeds from the disposition of these lands are held in trust." *Id.* at 21. Additionally,

based on article XII, section 6 of the Hawai'i Constitution, this court concluded that the State

> has the power to dispose of ceded lands. The actual use to which these lands is put by this disposition does not have to comport with one of the five enumerated purposes in the Admission Act as long as fair compensation for the disposition of these lands is used for trust purposes. *The actual issue in this case, therefore, is whether the issuance of the CDUA permit is a proper disposition of ceded lands.*

Id. at 21-22 (emphasis added) (footnote omitted). This court held that the "grant of the permit for the dredging of a marina entrance channel has an undisputably public purpose" and that, therefore, "BLNR's conditional grant of the permit to Haseko did not violate the public trust doctrine and was a proper disposition of public lands." *Id.* at 26-27.

"Collateral estoppel is an aspect of *res judicata* which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies." *Pele Defense Fund*, 73 Haw. at 599, 837 P.2d at 1261 (citations omitted) (format altered). Thus, the elements of collateral estoppel are:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.

Keahole Def. Coal., Inc. v. Bd. of Land & Natural Res., 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006) (citations omitted) (format altered); *see also Citizens for the Prot. of the N. Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 102, 979 P.2d 1120, 1128 (1999). These elements "are tempered only by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues." *Pele Defense Fund*, 73 Haw. at 600, 837 P.2d at 1261 (citations omitted).

In this case, the trial court ultimately determined that *Ewa Marina* did not collaterally estop the plaintiffs' claims in this case because the "issue of whether the State has the power to *sell* ceded lands ... was not 'essential' to the final judgment in *Ewa Marina*, which merely decided whether the BLNR could issue a permit to *dredge* submerged ceded lands." (Emphases in original.) Curiously, the trial court also found that "the issue of whether the State could sell or dispose of ceded lands for public purposes was actually litigated." However, the trial court, after taking judicial notice of the files in the *Ewa Marina* case, seemingly concluded to the contrary, *i.e.*, that the plaintiffs in the instant case-against whom collateral estoppel is asserted-did not have a " 'full and fair opportunity' in *Ewa Marina* to litigate" the State's authority to alienate ceded lands from the public lands trust.

Nevertheless, the trial court appears to have correctly determined that two of the elements of collateral estoppel were met in this case, to wit: (1) there was a final judgment on the merits in the *Ewa Marina* case; and (2) the individual plaintiffs are privies of OHA for the purposes of collateral estoppel. However, it is apparent that the other two elements of collateral estop-

pel are not met here. First, the issue decided in *Ewa Marina*—"whether the issuance of the CDUA permit [was] a proper disposition of ceded lands," *Ewa Marina*, slip op. at 22 (footnote omitted),-is not identical to the issue raised by the plaintiffs in this case, *i.e.*, whether the State, as trustee, should be enjoined from alienating ceded lands from the public lands trust until such times as the claims of the native Hawaiian people to the ceded lands are resolved. Second, the issue whether such an injunction should be issued was not essential to the final judgment in *Ewa Marina* inasmuch as this court in *Ewa Marina* needed to determine only whether the State violated its fiduciary duties by issuing the CDUA permit. Accordingly, we hold that the trial court correctly determined that *Ewa Marina* did not collaterally estop the plaintiffs' claims in this case. We now turn to the plaintiffs' contentions on appeal as they relate to (1) the Leiali'i parcel and (2) the ceded lands in general. We then examine the political question doctrine and the plaintiffs' request for injunctive relief.

C. *The Leiali'i Parcel*

1. Sovereign Immunity

The trial court determined that the plaintiffs' claims with regard to the Leiali'i parcel were barred by sovereign immunity because title to the Leiali'i parcel had already been transferred to the HFDC. The trial court reasoned that, in order to return the Leiali'i parcel to the public lands trust, it would be required "to 'turn back the clock and examine actions already taken by the State.' " Thus, the trial court concluded:

> The Leali'i [sic] [parcel is] no longer in the [p]ublic [l]ands [t]rust. Although the [p]laintiffs

> argue that the [parcel was] merely transferred to another State entity and that sovereign immunity therefore does not apply, the facts show that the State of Hawai'i received payment for the transfer of [this parcel] to the HFDC. [HRS §] 171-2 specifically exempts from the definition of "public lands" those lands to which the HFDC holds title in its corporate capacity. To return the [parcel] at Leali'i [sic] to the [p]ublic [l]ands [t]rust, the DLNR would have to expend moneys from the State treasury. Moreover, the HFDC has already spent millions of dollars improving those properties.
>
> Accordingly, this court cannot compel HFDC to return the [parcel] at Leali'i [sic] to the [p]ublic [l]ands [t]rust without directly affecting the state treasury. Pursuant to Pele Defense Fund v. Paty, [73 Haw. 578, 837 P.2d 1247 (1992),] [the p]laintiffs' request for injunctive relief ... with respect to Leali'i [sic] is, therefore, barred by sovereign immunity.

On appeal, the plaintiffs argue that the trial court erred in concluding that their claim with regard to the Leiali'i parcel was barred by the doctrine of sovereign immunity. Specifically, the plaintiffs take issue with the trial court's reliance on *Pele Defense Fund*. The plaintiffs assert that their claim regarding the Leiali'i parcel was not barred by sovereign immunity because the claim is for prospective injunctive relief. Additionally, the OHA plaintiffs contend that: (1) the requested injunction would not directly affect the State treasury inasmuch as the transfer "from DLNR to HFDC was a paper transaction shifting title from one State agency to another for which DLNR received a mere $1[.00]"; and (2) the "dispute over the Leiali'i [parcel] involves

governmental agencies rather than private parties." Consequently, the OHA plaintiffs argue that the case at bar is distinguishable from *Pele Defense Fund*.

The defendants, on the other hand, believe—as did the trial court—that "the State has already transferred the Leiali'i [parcel] to HFDC" and, therefore, to return the parcel to the public lands trust, "DLNR would have to expend moneys from the State treasury." The defendants, therefore, maintain that the trial court correctly determined that *Pele Defense Fund* mandates the conclusion that the plaintiffs' claim is barred by sovereign immunity. Moreover, the defendants argue that the exception to sovereign immunity recognized in *Pele Defense Fund*—"for 'the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawai'i constitutional and statutory provisions governing the public land trust' "—is inapplicable in this case "because the Admission Act and state constitutional and statutory provisions explicitly authorize the State to sell ceded lands."

> The doctrine of sovereign immunity dictates that
>
> > the State cannot be sued without its consent or waiver of its immunity in matters "involving the enforcement of contracts, treasury liability for tort, and the adjudication of interest in property which has become unsullied by tort into the bosom of government." However, *sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional. Nor will sovereign immunity bar suits to enjoin state officials from violating state statutes.*

Pele Defense Fund, 73 Haw. at 607, 837 P.2d at 1265 (emphasis added) (internal brackets, ellipsis, and citations omitted) (format altered). Additionally, this court has adopted the rule from Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which makes an important distinction between prospective and retrospective relief. Id. at 609, 837 P.2d at 1266.

> *If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury.* However, relief that is tantamount to an award of damages for a past violation of law, even though styled as something else, is barred by sovereign immunity.

Id. at 609-10, 837 P.2d at 1266 (emphasis added) (citations, ellipsis, footnote, and internal quotation marks omitted). The burden is on the State to prove "with specific facts that the effect on the State treasury will be directly, substantially, and quantifiably impacted." *OHA II*, 110 Hawai'i at 357, 133 P.3d at 786 (footnote omitted).

Pele Defense Fund involved a claim brought by a non-profit corporation comprised of native Hawaiian beneficiaries of the section 5(f) Admission Act trust, challenging the exchange of ceded lands in Puna on the island of Hawai'i for privately owned lands. 73 Haw. at 584-85, 837 P.2d at 1253. The plaintiff prayed for, *inter alia*, injunctive relief to restore the Puna parcel to the public lands trust, arguing that the transfer constituted a breach of the trust created under section 5(f) and article XII, section 4 of the Hawai'i Constitution. *Id.* This court held that, although the plaintiff's claim was

couched as a claim for prospective injunctive relief, its "request that the trust status of the exchanged lands be restored by means of a constructive trust [was] essentially equivalent to a nullification of the exchange and the return of the exchanged lands to the trust res." *Id.* at 611, 837 P.2d at 1267 (internal quotation marks omitted). This court, therefore, concluded that the "effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands [then privately owned] would require ... the State to compensate [the purchaser] for its property." *Id.* at 611, 837 P.2d at 1267 (citations omitted). Consequently, we held that the plaintiff's "requested relief [was], in effect, a request for compensation for the past actions of the [State]" and was, accordingly, barred by sovereign immunity. *Id.*

Subsequent cases decided by this court have reaffirmed the continued viability of the analysis articulated in *Pele Defense Fund*. *See, e.g.*, *OHA II*, 110 Hawai'i at 356-57, 133 P.3d at 785-86 (holding that, under *Pele Defense Fund*, plaintiffs' claims alleging a breach of the State's fiduciary duties were barred by sovereign immunity because the plaintiffs requested relief—a share of revenues that the State had collected from the ceded lands trust—was essentially a request for past monetary damages, and, therefore, the relief requested was "retrospective"); *Bush v. Watson*, 81 Hawai'i 474, 481-82, 918 P.2d 1130, 1137-38 (1996) (holding that claims by native Hawaiian homestead lessees, challenging the validity of third-party agreements (TPAs) between other lessees and non-Hawaiian farmers as violating the Hawaiian Homes Commission Act, were not barred by sovereign immunity because they sought declaratory and injunctive relief that would void existing TPAs and enjoin the Hawaiian Homes Commission

from approving future TPAs); *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 208 n. 26, 891 P.2d 279, 295 n. 26 (1995) (noting that, with respect to claims against state officials, claimants cannot recover money damages or the equivalent for past violations of law; nevertheless, relief that is prospective in nature may be allowed regardless of the state's sovereign immunity).

Most recently, this court affirmed the *Pele Defense Fund* analysis in *Kaho'ohanohano v. State*, 114 Hawai'i 302, 162 P.3d 696 (2007). *Kaho'ohanohano* involved a class action lawsuit brought by members of the Employees' Retirement System of the State of Hawai'i (ERS), the State of Hawai'i Organization of Police Officers, and the trustees of ERS [hereinafter, the plaintiffs] against the State alleging a breach of trust. *Id.* at 310, 162 P.3d at 704. The plaintiffs sought declaratory and injunctive relief based on a challenge to a statute that authorized the diversion of $346.9 million from the ERS fund, which the plaintiffs alleged violated the State's constitutional and contractual obligations to ERS members. *Id.* at 315, 162 P.3d at 709. This court determined that, inasmuch as the State had not expressly waived sovereign immunity and the plaintiffs did not claim money damages, "the relevant inquiry [was] whether the relief sought for a past violation of law [was] 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Id.* at 337, 162 P.3d at 731 (citation and other internal quotation marks omitted).[18] Ultimately, this

[18] We note that this court's conclusion in *Kaho'ohanohano* is consistent with *Bush*, wherein we "decline[d] to adopt the federal courts' narrow view that a claim for relief based on past illegal action is necessarily 'retrospective[,]' " holding instead that "the cru-

court concluded that, by granting the plaintiffs' requested relief, the effect on the state treasury, if any, would be only "ancillary" inasmuch as the state would be prohibited from any future " skimming" from the ERS fund. *Id.* Accordingly, this court held that the plaintiffs' claims were not barred by sovereign immunity. *Id.* at 337-38, 162 P.3d at 731-32.

In this case, the plaintiffs seek to enjoin the actions of state executive officials from transferring the Leiali'i parcel because they believe such transfer would further diminish the corpus of the public lands trust-in violation of the State's constitutional and statutory fiduciary duties-before their unrelinquished claims to the ceded lands could be resolved. As in *Kaho'ohanohano*, the State, here, has not expressly waived sovereign immunity, and the plaintiffs do not claim money damages. Although the plaintiffs characterize their claim with respect to the Leaili'i parcel as being one for prospective injunctive relief, *i.e.*, enjoining the transfer of the Leiali'i parcel, the parcel was, in fact, transferred from DLNR to HFDC on the same day the plaintiffs filed suit. Accordingly, in this case, as in *Kaho'ohanohano*,"the relevant inquiry is whether the relief sought for a past violation of law[, *i.e.*, the transfer of property,] is 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Kaho'ohanohano*, 114 Hawai'i at 337, 162

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cial inquiry under our sovereign immunity principles is whether the relief sought for a past violation of law is 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Bush*, 81 Hawai'i at 482 n. 9, 918 P.2d at 1138 n. 9 (citations omitted).

P.3d at 731 (some internal quotation marks and citation omitted).

Unlike *Pele Defense Fund*, in which ceded lands were exchanged for privately owned lands, the Leiali'i parcel was transferred from one state agency to another, *i.e.*, from DLNR to HFDC. Moreover, the consideration of $1.00 was also paid from one state agency to another. In other words, the return of the property and purchase price between both state agencies effectively changes nothing. Both the parcel and the $1.00 would remain within the control of the State. To the contrary, because the lands at issue in Pele Defense Fund had been transferred to a private third-party, this court concluded that *the State would have to compensate the private third-party* for the return of the property in the public lands trust. 73 Haw. at 611, 837 P.2d at 1267. In that regard, *Pele Defense Fund* is distinguishable from the instant case because the Leiali'i parcel would remain within the control of the State. Returning the parcel to the public lands trust would require only that the HFDC transfer title back to DLNR and that DLNR pay only $1.00 for such transfer. As such, the effect on the State treasury, if any, would be only ancillary.

However, in concluding that sovereign immunity barred the plaintiffs' claims with regard to the Leiali'i parcel, the trial court additionally relied upon the fact that, prior to the transfer of the Leiali'i parcel, HFDC had spent $31 million developing infrastructure on the property. In so doing, the trial court did not provide any explanation as to how the expenditure of $31 million *prior* to the plaintiffs' filing of the present lawsuit resulted in a "direct" as opposed to "ancillary" effect on the state treasury. We further observe that the parties do not any present argument on this issue.

Although we recognize that $31 million dollars is a significant sum of money, that fact alone is insufficient to support a conclusion that such past expenditure constitutes a "direct" future effect on the state treasury. Indeed, as previously stated, sovereign immunity does not bar a claim for prospective injunctive relief "*even though accompanied by a substantial ancillary effect on the state treasury.*" *Pele Defense Fund*, 73 Haw. at 609, 837 P.2d at 1266 (emphasis added) (internal quotation marks, citation, and footnote omitted). In the case at bar, the plaintiffs are not asking that the $31 million be returned to them or even to the state treasury. Moreover, the benefit of the $31 million expenditure by HFDC on infrastructure remains with the State. Thus the plaintiffs' requested relief—*i.e.*, an injunction—is not "tantamount to an award of damages for a past violation of law." *Id.* at 609-10, 837 P.2d at 1266 (internal quotation marks, citation, and ellipsis omitted). As such, the effect of the expenditure of $31 million on the state treasury is "ancillary"—albeit a substantial one. We, therefore, hold that the plaintiffs' claim for injunctive relief with regard to the Leiali'i parcel is not barred by sovereign immunity. Accordingly, we also hold that the trial court erred in determining otherwise.

2. Waiver and Estoppel

The plaintiffs argue that the trial court erred in determining that the defenses of waiver and estoppel barred the plaintiffs' request for injunctive relief with respect to the Leiali'i parcel. Because waiver and estoppel are distinct doctrines, we analyze them separately below.

a. *waiver*

The trial court concluded that the

> [p]laintiffs, by their actions and inactions during the seven years between 1987 and 1994 ... waived any right they may have had to contest the sale of [the Leiali'i parcel] to HFDC as illegal.
>
> ....
>
> The [i]ndividual [p]laintiffs argue that they and their counsel relied on Congress's 1993 Apology Resolution and the Legislature's Act 359 of 1993 as central bases to seek an injunction in the fall of 1994 on the sale of ceded lands, pending resolution of the Hawaiians' claim to ownership of the ceded lands. Mr. Meheula's discussions with the OHA Board did cause OHA to insist in the fall of 1994 that a disclaimer be placed in the HFDC agreements.
>
> As a practical matter, however, neither OHA nor the [i]ndividual [p]laintiffs objected to the sale of the [Leiali'i parcel] until the fall of 1994. In any event, even if the [p]laintiffs did not consider challenging the State's power to sell ceded lands until after the Apology Resolution was adopted in 1993, OHA's continuing to negotiate for market value after the Apology Resolution was passed is also "conduct from which an intention to waive may reasonably be inferred." [The p]laintiffs' failure to object to the development plan, which included market homes, before the LUC and Legislature in testimony relating to Act 318 is "wholly inconsistent with any dissatisfaction" with the devel-

> opment plan, also suggesting waiver of any right to challenge them. [*Goo v. Hee Fat*, 34 Haw. 123, 129 (1997) [(1937)], *overruled on other grounds by Goo v. Goo*, 36 Haw. 530 (1943).]
>
> Moreover, HFDC and the State were prejudiced by their reliance on [p]laintiffs' acquiescence in the development plan to sell [the Leiali'i parcel]. As testified to by the project managers for both Leali'i [sic] and La'i'opua, there were no objections from OHA as to the State's power to sell public trust lands for those projects until November 1994. By that time, however, $31 million had already been invested in Leali'i [sic].

(Footnotes omitted.)

The plaintiffs argue that they did not waive their claim with regard to the Leiali'i parcel. The OHA plaintiffs' [sic] maintain that,

> [a]fter the passage of the Apology Resolution, and as the full import of the congressional findings that [c]rown, [g]overnment and [p]ublic lands were ceded to the United States "without the consent of or compensation to the [n]ative Hawaiian people of Hawai'i or their sovereign government" and that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States[ ]" became evident, the OHA Trustees took appropriate action to assure that the claim to the "national lands" of the [n]ative Hawaiian people was properly asserted.

As indicated by the trial court, the individual plaintiffs posit that, "[a]lthough OHA did not earlier object to the transfer of ceded lands for the ultimate sale to homeowners in the Leiali'i project, the 1993 legislation [(*i.e.*, the Apology Resolution, as well as, Acts 359 and 329, discussed *supra*)] and Mr. Meheula's discussions with the OHA Board in [September 1994] were new events that justified their objection in [September 1994]."

Relying on the ruling and rationale of the trial court, the defendants maintain that the plaintiffs waived their claims regarding the Leiali'i parcel because the "[p]laintiffs' failure to object to the development plan at the LUC and before the Legislature in testimony relating to Act 318 [(setting forth a formula to compensate OHA for the 'villages of Leiali'i, Maui and villages of La'i'opua, Hawai'i')] is 'wholly inconsistent with any dissatisfaction' with the development plan ... and[, therefore,] clearly waived any right to challenge the plan." The defendants further maintain that, "[e]ven if plaintiffs did not think to challenge the State's power to sell [c]eded lands until after the Apology Resolution, OHA's continuing to negotiate for 'market value' after the Apology Resolution was passed is clearly 'conduct from which an intention to waive may reasonably be inferred.' "

This court has defined waiver as "an intentional relinquishment of a *known right*, a voluntary relinquishment of rights, and the relinquishment or refusal to use a right." *Coon v. City & County of Honolulu*, 98 Hawai'i 233, 261, 47 P.3d 348, 376 (2002) (emphasis added) (citation omitted).

> To constitute a waiver, there must have existed a right claimed to have been waived and the

> waiving party *must have had knowledge, actual or constructive, of the existence of such a right at the time of the purported waiver.* While the question whether a valid waiver exists is generally a question of fact, "when the facts are undisputed it may become a question of law." *Hawaiian Homes Comm'n v. Bush*, 43 Haw. 281, 286 (1959) (citations omitted); *see also Stewart v. Spalding*, 23 Haw. 502, 517 (1916) ("The question of waiver is usually a mixed one of law and fact but where the facts are undisputed and are susceptible of but one reasonable inference it becomes one of law for the court." (Citations omitted.)).

Id. at 261-62, 47 P.3d at 376-77 (some citations and original ellipsis omitted) (emphasis added). Furthermore,

> *[w]aiver must be intentional.* Such intention may be indicated by language or conduct, may be either express or implied but does not necessarily imply that one has been misled to his prejudice or into an altered position. Waiver depends upon the intention of the party who is charged with the waiver.... It may be proven by an express declaration of the party charged with the waiver. It may also be proved by the existence of acts or language so inconsistent with the purpose of the person charged to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary.

Hewahewa v. Lalakea, 35 Haw. 213, 218-19 (1939) (emphasis added) (internal quotation marks and citations omitted).

In this case, the record indicates that the first time that OHA had knowledge that DLNR intended to alienate the Leiali'i parcel from the public lands trust for the purposes of residential development was in December 1989 when HFDC filed a petition with the LUC to reclassify the Leiali'i parcel from agriculture to urban use. It is undisputed that OHA did not object to the transfer of the Leiali'i parcel and participated in negotiations with HFDC regarding the parcel's fair market value, pursuant to Act 318. As previously stated, it was not until the adoption of the Apology Resolution that OHA requested the disclaimer that its acceptance of funds would not affect any further claim the native Hawaiian people may have to the Leiai'i parcel. When HFDC declined to honor their request, the plaintiffs filed suit.

In support of their position that they did not waive their claim with regard to the Leiali'i parcel, the plaintiffs essentially maintain that the Apology Resolution gave rise to their breach of trust claim. Pointing to language in the Apology Resolution that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, the plaintiffs submit that title to the ceded lands is now clouded.

Having held that the Apology Resolution and related state legislation give rise to a fiduciary duty by the State, as trustee, to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved, it necessarily follows that it was not until at least November 23, 1993, when the Apology Resolution was signed into law by President

Clinton, that the plaintiffs "had knowledge, actual or constructive, of the existence of ... a right [claimed to have been waived] at the time of the purported waiver." *Coon*, 98 Hawai'i at 261, 47 P.3d at 376 (citation omitted). Consequently, we cannot say that the plaintiffs' purported waiver was "intentional," expressly or impliedly. *Hewahewa*, 35 Haw. at 218. Accordingly, we hold that the trial court's conclusion that OHA's actions between 1987 and 1994 constituted a waiver of the plaintiffs' claims was clearly erroneous and that, therefore, the trial court erred in determining that the plaintiffs waived their claim for injunctive relief with regard to the Leiali'i parcel.[19]

b. *estoppel*

The trial court ruled that, "[f]or the same reasons that [the p]laintiffs waived any challenge to the legality of the sales of Leali'i [sic] lands, [the p]laintiffs are estopped from making that challenge." Specifically, the trial court found that,

> [a]pplying equitable estoppel and quasi estoppel principles to the case at hand, during the years of negotiations and planning for Leali'i [sic] before [the p]laintiffs filed this lawsuit,

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[19] The trial court also based its holding on the fact that the defendants expended over $31 million dollars on improvements to the Leiali'i parcel prior to the transfer from DLNR to HFDC. However, the question on waiver is strictly whether the party charged with waiver intended to waive a known claim, *Hewahewa*, 35 Haw. at 218-19, not whether the party seeking to prove waiver was prejudiced, as was determined by the trial court. As such, the trial court's finding that, because OHA did not object to the transfer of the Leiali'i parcel until 1994, HFDC and the State were prejudiced by their reliance on the plaintiffs acquiescence in the project does not apply to an analysis of waiver.

[the p]laintiffs did not suggest that they would file a lawsuit challenging the right to sell the [Leiali'i parcel] to HFDC and in turn to third parties for their homes. During these same five years, the [p]laintiffs had notice of the planned development at Leali'i [sic], but chose not to challenge it. The State spent substantial amounts of time and money developing [the parcel] before November 1994 when [the p]laintiffs first filed suit.

By their action (or inaction with respect to the [i]ndividual [p]laintiffs) and conduct ... [the p]laintiffs caused the HFDC to believe that no one would challenge its acquisition of the [Leiali'i parcel] as long as OHA and DLNR received fair monetary compensation for the lands. [The p]laintiffs' acquiescence in the development of Leali'i [sic] and HFDC's expenditure of funds for infrastructure, and OHA's active participation in negotiations for an appraised value for the ceded lands induced the State to continue moving forward with the housing development. The State obtained necessary land use changes, entered into agreements with developers, made agreements with county officials and spent over $31 million for infrastructure at Leali'i [sic] alone. The State significantly altered its position because of the statements and conduct of OHA, as well as the inaction of the [i]ndividual [p]laintiffs. [The p]laintiffs are, therefore, also estopped from challenging the State's sale of public trust lands at Leali'i [sic].

It is true, as argued by the OHA [p]laintiffs, that the doctrine of equitable estoppel cannot

> be invoked against a governmental agency such as OHA in the absence of overt detrimental reliance and "manifest injustice." The law recognizes that governmental bodies must be able to change their minds in some circumstances. Thus, a mere change of mind by the government does not invoke estoppel unless the other party had detrimentally relied upon the agency's earlier position to such an extent that it would constitute a "manifest injustice" to fail to invoke and apply the doctrine. In this case, however, based on the facts above, the requisite showings of extensive detrimental reliance by and manifest injustice to the [d]efendants have been satisfied to invoke equitable estoppel against the OHA plaintiffs. Thus, the doctrine of estoppel prohibits both sets of [p]laintiffs from seeking injunctive relief with respect to the sale of [the Leiali'i parcel].

(Internal footnotes omitted.) (Format altered.)

The OHA plaintiffs argue that the trial court erred in concluding that the doctrine of estoppel barred the plaintiffs claims because it is "manifestly unjust to [n]ative Hawaiians to allow alienation of [c]eded []lands-their national lands-prior to a final resolution of the [n]ative Hawaiian land claim." Additionally, the OHA plaintiffs argue that the application of the doctrine of equitable estoppel against the government is not favored, and, furthermore, "there can be no suggestion here that OHA wilfully misled the HFDC in its earlier position on the Leiali'i [parcel] or acted in bad faith." The individual plaintiffs appear to contend that estoppel is not applicable in this case because it is an equitable defense, which cannot be raised against the plaintiffs because "the 1993 Legislation obligated the

State to seek instructions from the [c]ourt before selling ceded lands without prompting by [the p]laintiffs."

The defendants insist that the trial court correctly determined that the plaintiffs were estopped from challenging the transfer of the Leiali'i parcel because the "unchallenged findings of facts show that HFDC spent more than $31 million at Leiali'i over a seven-year period in reliance on OHA's failure to object to the project." Accordingly, the defendants assert that "[t]hese facts squarely raise the defense of equitable estoppel[.]"

"The theory of equitable estoppel requires proof that one person wilfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous belief to his or her detriment." *Potter v. Hawai'i Newspaper Agency*, 89 Hawai'i 411, 419, 974 P.2d 51, 59 (1999) (citation omitted). "A species of equitable estoppel, the principle of quasi estoppel, precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken." *Id.* at 420, 974 P.2d at 60 (internal brackets and citation omitted).

As the OHA plaintiffs correctly point out, "[t]he application of the doctrine of equitable estoppel against the government is not favored." *Turner v. Chandler*, 87 Hawai'i 330, 333, 955 P.2d 1062, 1065 (App. 1998) (citations omitted). However, this court has also stated that the doctrine "is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice." *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 126, 566 P.2d 725, 737 (1977) (internal quotation marks and citation omitted).

As previously discussed, it was not until the Apology Resolution was signed into law on November 23,

1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis. Consequently, the plaintiffs cannot be deemed to have "wilfully caused [the defendants] to erroneously believe *a certain state of things*," *Potter*, 89 Hawai'i at 419, 974 P.2d at 59, upon which the defendants relied to their detriment.

Accordingly, we conclude that the trial court incorrectly determined that the plaintiffs were estopped from challenging the transfer of the Leiali'i parcel based on their pre-1993 actions and hold that the plaintiffs' claims are not barred by the principles of equitable and quasi estoppel. We now turn to the plaintiffs' arguments as they relate to the ceded lands in general.

D. *The Ceded Lands in General*

1. Sovereign Immunity

With regard to ceded lands in general, the trial court concluded that:

> Case law has held that sovereign immunity does not bar a suit for injunctive relief to prohibit state officials from acting in an illegal manner. [(Citing in a footnote to *Pele Defense Fund, supra.*)] The State of Hawai'i has not consented, however, to be sued in a lawsuit contesting the validity of its title to the ceded lands. "It is the law in this jurisdiction that a proceeding against property in which the State of Hawai'i has an interest is a suit against the State and cannot be maintained without the consent of the State," so that the State "and its interest in land are immune from suit." [(Cit-

> ing in a footnote to *A.C. Chock, Ltd. v. Kaneshiro*, 51 Haw. 87, 88, 451 P.2d 809, 811 (1969).)] "If it is made to appear at any stage of the case that the State claims title, the court's jurisdiction over the merits of such claim thereby is ousted under the doctrine of sovereign immunity." [(Citing in a footnote to *Marks v. Ah Nee*, 48 Haw. 92, 94, 395 P.2d 620, 622 (1964).)]
>
> A claim for injunctive and declaratory relief would have the effect of depriving the State of control over public lands under [HRS] chapters 171 and 201E is the "functional equivalent of a quiet title action," and is barred by sovereign immunity. [(Citing in a footnote to *Idaho v. Couer [Coeur] d'Alene Tribe*, 521 U.S. 261 | 117 S. Ct. 2028, 138 L. Ed. 2d 438] (1997).)] Looking beyond the pleadings to "examine the effect" of the suit and "its impact on these special sovereignty interests [of the State]," sovereign immunity bars [p]laintiffs' claims to the extent they seek relief based on an allege [sic] cloud on the State's title to ceded lands. Where the "requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters," and "would diminish, even extinguish, the State's control over a vast reach of land and waters long deemed by the State to be an integral part of its territory," sovereign immunity applies. [(Citing in a footnote to *Couer [Coeur] d'Alene*)]

(Internal footnotes omitted.)

The plaintiffs take issue with the trial court's reliance on *Coeur d'Alene*. Specifically, the plaintiffs chal-

lenge the trial court's determination that their claims with regard to the sale of ceded lands in general "were the functional equivalent of a quiet title action"[20] and, therefore, barred by sovereign immunity inasmuch as " '[i]t is the law in this jurisdiction that a proceeding against property in which the State of Hawai'i has an interest in is a suit against the State and cannot be maintained without the consent of the State[.]' " On appeal, the OHA plaintiffs contend that they are not seeking ownership of property from this court, but "*only* an order prohibiting the transfer of [c]eded [l]ands pending the resolution of [n]ative Hawaiian claims." (Emphasis in original.) As such, the OHA plaintiffs argue that the trial court's reliance on *Coeur d'Alene*, discussed *infra*, was error. The OHA plaintiffs submit that the trial court should have, instead, been guided by *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999), discussed *infra*. The individual plaintiffs similarly maintain that they "do not seek an ownership determination or even a declaration that they are entitled to the beneficial use and/or occupancy of the ceded lands."

The defendants, however, contend that the trial court correctly relied on *Coeur d'Alene* because, as in this case, " 'the requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed

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[20] An action to quiet title is defined as an action brought "by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim." HRS § 669-1(a) (1993).

lands and waters,' and 'would diminish, even extinguish the State's control over a vast reach of lands ... long deemed by the State to be an integral part of its territory.'" (Citing *Coeur d'Alene*, 521 U.S. at 282, 117 S. Ct. 2028).

In *Coeur d'Alene*, the sole issue before the Court was whether the federally recognized Coeur d'Alene Tribe's (the Tribe) suit against the State of Idaho, seeking "the beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters (the 'submerged lands') within the original boundaries of the Coeur d'Alene Reservation," was barred by sovereign immunity. 521 U.S. at 264-65, 117 S. Ct. 2028. The Tribe styled its suit as a claim for declaratory and injunctive relief, "alleging an ongoing violation of its property rights in contravention of federal law and [seeking] prospective injunctive relief." *Id.* at 266, 281, 117 S. Ct. 2028. The Court recognized that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* [exception].[21] However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281, 117 S. Ct. 2028. The Court, in its principal

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[21] As previously indicated, this court, in *Pele Defense Fund*, adopted the rule expressed in *Ex Parte Young*, which differentiated between prospective and retrospective relief. 73 Haw. at 609, 837 P.2d at 1266. Accordingly, it is the law in this state that, "[i]f the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury." *Id.* (internal quotation marks and citations omitted); *see* discussion *supra*.

decision, determined that the Tribe's suit was the functional equivalent of a quiet title action "in that substantially all benefits of ownership and control [in the submerged lands] would shift from [Idaho] to the Tribe." *Id.* at 282, 117 S. Ct. 2028. Moreover, the Court reasoned that the submerged lands "have historically been considered 'sovereign lands[,' and] State ownership of them has been considered an essential attribute of sovereignty." *Id.* at 283, 117 S. Ct. 2028 (internal quotation marks and citation omitted). The Court concluded:

> [I]t is apparent, then, that[,] if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 287-88, 117 S. Ct. 2028.

In a concurring opinion, Justice O'Connor seemingly attempted to clarify the Court's decision by distinguishing *Coeur d'Alene* from *Ex parte Young*. She noted that

> the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law. Rather, the Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only

> that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all.

Id. at 289, 117 S. Ct. 2028 (O'Connor, J., concurring).

As previously stated, the OHA plaintiffs suggest that the trial court erred in applying the *Coeur d'Alene* analysis and should look instead to the Eighth Circuit's opinion in *Mille Lacs*. In *Mille Lacs*, the Mille Lacs Band of Chippewa Indians (the Band), amongst others, brought an action for injunctive and declaratory relief, seeking to enforce its alleged treaty rights to hunt, fish, and gather on state and private lands free of state regulation. 124 F.3d at 914. The Eighth Circuit held that the Band's claims were not barred by sovereign immunity, reasoning, inter alia, that the Bands' claims "[sought] prospective injunctive relief against state officials in their official capacities for continuing violations of the Bands' federal treaty rights. As such, they fall squarely within the *Ex parte Young* exception to the [sovereign immunity doctrine]." *Id.* The court further noted that its holding was supported by the *Coeur d'Alene* Court's concurring opinion, which observed that "[a] *Young* suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id.* (quoting *Coeur d'Alene*, 521 U.S. at 294, 117 S.Ct. 2028 (O'Connor, J., concurring)) (internal quotation marks omitted).

In the present case, the plaintiffs, unlike the *Coeur d'Alene* plaintiffs, do not seek a determination from this court that would shift "the benefits of ownership and control [of the ceded lands] from the State to [themselves]." *Coeur d'Alene*, 521 U.S. at 282, 117 S. Ct.

2028. Rather, they seek only to enjoin the defendants from alienating ceded lands.

Based on *Mille Lacs* and Justice O'Connor's concurrence in *Coeur d'Alene*, a claim seeking injunctive relief with regard to property rights may be maintained, if it falls within the *Young* exception, *i.e.*, allowing only prospective injunctive relief. Here, as the plaintiffs have repeatedly made clear, they are not asking this court to return the ceded lands to the possession of the plaintiffs; they seek only an injunction barring the *future* alienation—by way of sale or transfer—of ceded lands until their unrelinquished claims to those lands are resolved via the reconciliation process contemplated by the Apology Resolution and related state legislation. As such, the plaintiffs' requested relief is clearly prospective in nature and, therefore, not barred by sovereign immunity under the *Young* exception.

Based on the foregoing discussion, we hold that the plaintiffs' claims with regard to the sale or transfer of the ceded lands in general are not barred by sovereign immunity. Accordingly, we also hold that the trial court incorrectly determined that sovereign immunity barred the plaintiffs' claims.[22]

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[22] In addition to the arguments stated above, the individual plaintiffs, in their opening brief, argue that the State waived sovereign immunity under the "Native Hawaiian Trusts Judicial Relief Act" contained in HRS chapter 673 (Supp. 2006). However, in a previous motion filed with the circuit court, the individual plaintiffs argued that "[c]hapter 673, Native Hawaiian Trusts Judicial Relief Act, does not permit [n]ative Hawaiians to sue the State for return of ceded lands." Inasmuch as the individual plaintiffs admit in a prior pleading that HRS chapter 673 does not apply in this situation and there is no other mention of this argument in the

2. Ripeness

The trial court, in ruling that the plaintiffs' claims with regard to the ceded lands in general were also barred by the ripeness doctrine, stated:

> With respect to "ripeness," *Pele Defense Fund* makes clear that beneficiaries of the ceded lands trust have standing to bring suit to enjoin disposition of ceded lands that would constitute breaches of trust. No evidence was presented, however, of any proposed sales of ceded lands other than at Leali'i [sic]. In fact the evidence suggests that the State has been following a self[-]imposed moratorium on the sales of additional ceded lands.[23] Proposed sales could con-

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proceedings before the trial court, the plaintiffs have waived this argument.

[23] In explaining the "self-imposed moratorium," the trial court stated:

> The Administrator for the Lands Division of the DLNR [(*i.e.*, Michael Wilson)] wrote [a memorandum] to [the] then Chair of DLNR, stating that "a moratorium" on the sale of ceded lands was in effect[ ] and that "the current moratorium is based on the concern that the sale of ceded lands diminishes the corpus of the public lands and thereby diminished the potential return to OHA [[hereinafter, the Wilson Memorandum]]."
>
> At trial, Gilbert Coloma-Agaran, chair of the BLNR, testified regarding the Wilson Memorandum as follows:
>
> Q [By OHA Plaintiffs' Counsel]: ... So, were you working for Michael Wilson at the time, deputy director?
>
> A: [By Coloma-Agaran]: In April '95, yes.
>
> Q: Are you familiar with that memorandum?

> stitute breaches of trust, but ... not all sales of ceded lands would violate the ceded lands trust.

The OHA plaintiffs argue that the trial court erred in determining that their claims were not ripe because "the court need not resolve the breach of trust issue in order to grant injunctive relief." Additionally, the OHA plaintiffs assert that

> the [trial] court's ruling places [the plaintiffs] on the horns of a dilemma. [The plaintiffs] it seems, filed both too early and too late. [They] waited too long on the Leiali'i parcel and not long enough on the moratorium. [The plaintiffs] must wait until the State takes preliminary steps to enjoin the sale of [c]eded [l]ands, but because the State took preliminary steps in the Leiali'i transfer, injunctive relief is barred be-

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A: I've seen it.

Q: And are you familiar with a moratorium that [then] Director Wilson refers to?

A: Yes.

Q: And could you-could you tell us what that was about.

A: I guess shortly after we got there Michael decided that given the controversy over the sale of ceded lands that we would try not to sell but that if we wanted to move forward some transaction, we would. So, if there were basically sales were [sic] already approved by the board before we got there we couldn't. If properties was [sic] necessary because of some ongoing project, you now, we take it case by case. But *that generally that we wouldn't encourage the sale of the public lands.*

(Emphasis added.)

(Footnotes omitted.)

> cause it would 'turn back the clock and examine actions already taken by the State.'

The defendants assert that the trial court correctly determined that the plaintiffs' claims were barred by the doctrine of ripeness because the plaintiffs "preemptive[ly] challenge" the "sale of any and all [c]eded [l]ands." The defendants reason that "any particular sale of [c]eded [l]ands could present a conflict of interest or a breach of fiduciary duty (for example, if the State proposed to sell for less than fair market value to a state official for his or her private benefit)[,]" but that "this [c]ourt should decline to speculate as to such future events." Additionally, the defendants argue that "the trial court rightly declined to enter relief based on the assumption that the coordinate and co-equal executive and legislative branches will engage in bad faith and wrongful conduct in the future. This [c]ourt should also decline to do so."

We have stated that "ripeness is peculiarly a question of timing, and a ruling that an issue is not ripe ordinarily indicates the court has concluded a later decision may be more apt or that the matter is not yet appropriate for adjudication." *County of Kaua'i ex rel. Nakazawa v. Baptiste*, 115 Hawai'i 15, 36, 165 P.3d 916, 937 (2007) (internal quotation marks and citation omitted). Moreover, "prudential rules of judicial self-governance founded in concern about the proper—and properly limited—role of courts in a democratic society, [and] considerations flowing from our coequal and coexistent system of government, dictate that we accord those charged with drafting and administering our laws a reasonable opportunity to craft and enforce them in a manner that produces a lawful result." *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Hawai'i 465, 483, 78 P.3d 1, 19 (2003) (internal quotation marks,

original brackets, and citation omitted). The federal courts have applied the following test, which we believe is instructive, in determining whether a particular case is ripe:

> Because ripeness is peculiarly a question of timing, the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention. The ripeness inquiry has two prongs: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The fitness element requires that the issue be primarily legal, need no further factual development, and involve a final agency action. To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss.

Rice v. Cayetano, 941 F. Supp. 1529, 1538 (D. Haw. 1996) (citations and internal quotation marks omitted), rev'd on other grounds, 528 U.S. 495, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

With respect to the first prong of the federal test, the plaintiffs must show that the issue regarding their entitlement to injunctive relief is fit for judicial decision because the issue is "primarily legal, need[s] no further factual development and involve[s] a final agency action." *Id.* (internal quotation marks and citation omitted). Here, as the plaintiffs argue, the issue is fit for judicial resolution inasmuch as they are not seeking a determination whether the native Hawaiian people are entitled to ownership of the ceded lands; what they are seeking is a determination whether an injunction is ap-

propriate to allow for a resolution of their claims to the ceded lands without further diminishment of the trust res. There is no doubt that the issuance of an injunction involves a legal question. *See, e.g.*,HRCP Rule 65 (2007) (governing the issuance of injunctive relief); *Wahba, LLC v. USRP (Don), LLC*, 106 Hawai'i 466, 106 P.3d 1109 (2005) (describing injunctions and temporary restraining orders). Moreover, the record demonstrates that there is no need for further factual development inasmuch as the facts necessary to decide ripeness are currently before this court. With regard to the Leiali'i parcel, a final agency action (*i.e.*, the transfer of the parcel from DLNR to HFDC) has been taken, and, although "final agency action" with regard to the ceded lands in general has yet to be taken, the very nature of the plaintiffs' requested relief—that an injunction issue to protect the corpus of the public land trust until the reconciliation efforts contemplated by the Apology Resolution and related state legislation has been completed—dictates that a judicial decision regarding the issuance of such an injunction is appropriate. We, therefore, believe that the fitness element has been met.

With respect to the second prong of the federal test, *i.e.*, the hardship requirement, the plaintiffs must show "that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss." *Rice*, 941 F.Supp. at 1538 (internal quotation marks and citation omitted). Here, inasmuch as the Leiali'i parcel was transferred to the HFDC for purposes of developing a residential housing project, and, although the defendants have voluntarily discontinued development, there exists a real threat that, should the HFDC proceed with the housing development project, the parcel could be transferred by

the HFDC to third parties. Moreover, as indicated by the trial court, "the State has been following a self[-]imposed moratorium on the sales of additional ceded lands." Thus, by the same token, should the State decide to lift its own moratorium, there is a potential for the sale or transfer of additional ceded lands. Once the ceded lands are alienated from the public lands trust, they will be lost forever and will not be potentially available to satisfy the unrelinquished claims of native Hawaiians to the lands, as recognized and contemplated by the Apology Resolution and the related state legislation, discussed supra. Were this court to withhold consideration of the plaintiffs' request for injunctive relief, the State would be free to alienate the ceded lands from the public lands trust. And, in so doing, the resulting hardship to the plaintiffs would be obvious—the alienated lands would be lost forever—and, as discussed more fully *infra*, the loss of the land itself entails a much greater injury "than possible financial loss." Were we to determine that the plaintiffs' claim for injunctive relief was not ripe, they may be left without a remedy while the corpus of the public lands trust continues to diminish, a result surely not contemplated by the Apology Resolution and our own state legislative pronouncements in Acts 354 and 359.

Moreover, were this court to grant the plaintiffs' requested injunctive relief, it would not be overstepping "prudential rules of judicial self-governance," *Save Sunset Beach Coal.*, 102 Hawai'i at 483, 78 P.3d at 19 (original brackets omitted), because, as previously indicated, such a decision would not involve a determination whether the native Hawaiian people are entitled to ownership of the ceded lands; we need only address whether an injunction is appropriate to allow resolution of these claims without further diminishment of the

trust res. As such, any injunctive relief granted by this court would allow Congress and/or the state legislature a "reasonable opportunity to craft and enforce," *id.*, relevant laws consistent with the congressional and legislative calls for reconciliation and settlement of native Hawaiian claims.

Based on the foregoing discussion, we hold that the plaintiffs' claims—to the extent they seek injunctive relief—are ripe for adjudication and, accordingly, hold that the trial court erred in determining otherwise. Because the plaintiffs' remaining claims do not necessitate a distinction between the Leiali'i parcel and the ceded lands in general, the following discussion encompasses both the Leiali'i parcel and the ceded lands in general.

E. *Political Question*

"The political question doctrine, often considered the most amorphous aspect of justiciability, holds generally that certain matters are political in nature and thus inappropriate for judicial review." *Nishitani v. Baker*, 82 Hawai'i 281, 290, 921 P.2d 1182, 1191 (App. 1996) (citation omitted). In deciding whether the political question doctrine should be invoked, this court, in *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987), adopted the test recited by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962):

> Prominent on the surface of any case held to involve a political question is found[: (1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and

> manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Yamasaki, 69 Haw. at 170, 737 P.2d at 455 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. 691) (format altered). The presence of any one of these six factors renders a case nonjusticiable. *Id.* Moreover, the political question doctrine is "essentially a function of the separation of powers." *Id.* (citation omitted).

The trial court concluded that all the plaintiffs' claims were barred by the doctrine of political question. Specifically, the trial court ruled that this court has held that "the issue of whether the Territory of Hawai'i received good title to the ceded lands is a nonjusticiable political question," and, as such, it was precluded from "consider[ing] the merits of [p]laintiffs' claim that the sale of ceded lands is prohibited due to a cloud on the States's title due to the illegality of the overthrow."[24]

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[24] As previously indicated, the trial court, nevertheless, went on to determine that the State had the legal authority to sell ceded lands.

In challenging the trial court's ruling, the OHA plaintiffs assert that their claims do not present a non-justiciable political question because, in their view, they are "not seeking a judicial resolution of the underlying claim for a return of lands," but, instead, are asking only that this court "protect the trust assets while the dispute is being resolved by the political branches." In other words, the plaintiffs specifically assert that they are *not* "ask[ing] this [c]ourt to resolve any claim [to the ceded lands], but only to protect the trust assets that are in dispute by issuing an injunction barring the sale or transfer of the [ceded] lands. [The plaintiffs] are seeking only to have this [c]ourt protect the [c]eded [l]ands from dissipation until the political branches can reach a just solution to this dispute." In fact, the OHA plaintiffs admit that "the ultimate resolution of the [n]ative Hawaiian claims must be through the political processes, and it is actively engaged in these processes. But this struggle for justice *will be futile if the assets in disputes [i.e., the ceded lands] no longer exist when a solution is found.*" Additionally, the individual plaintiffs point out that their claims are not barred by the political question doctrine because the standards that apply to trusts provide this court with "judicially discoverable and manageable standards for resolving this issue."

The defendants maintain that the trial court correctly determined that the plaintiffs' claims presented non-justiciable political questions inasmuch as, "[f]or nearly 100 years[,] the Hawai'i Supreme Court has foreclosed judicial inquiry into the State's title to the [c]eded [l]ands because the issue presents a political question, inappropriate for decision by the judicial branch." Moreover, the defendants argue that there are four specific reasons why the plaintiffs' claims pre-

sent a non-justiciable political question: (1) "the case involves examination of questions for which there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' "; (2) "there is a 'lack of judicially discoverable and manageable standards for resolving' this case"; (3) "the case is impossible to decide 'without an initial policy determination of a kind clearly for nonjudicial discretion' "; and (4) "[this c]ourt cannot undertake an 'independent resolution without expressing lack of the respect due coordinate branches of government.' "

The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved. The important distinction here is that this court is *not* being asked to decide whether native Hawaiians are *entitled* to the ceded lands. As even the plaintiffs recognize, the "ultimate resolution of the [n]ative Hawaiian claims must be through the political process." We believe, as discussed *supra*, that the Apology Resolution—which is at the heart of the plaintiffs' claim—and the related state legislation, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved. Accordingly, we hold that the Apology Resolution and the related state legislation provide the standards needed for determining whether the *issuance on an injunction* is proper. In other words, the question before this court—whether an injunction should issue—presents a type of dispute that is tradi-

tionally resolved in the judiciary and, therefore, does not present a non-justiciable political question.

Moreover, we believe that the defendants' arguments with regard to four of the six Baker factors, previously enumerated, are without merit. First, this case does not involve "an examination of questions for which there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' " inasmuch as the plaintiffs only request an injunction pending the resolution of the plaintiffs' underlying claims in the legislative process, and this court need not encroach on any issues that have been constitutionally committed to a coordinate political department in order to determine if injunctive relief is appropriate. Second, there are, as discussed *infra*, judicially manageable standards for issuing an injunction. Third, this court need not make " 'an initial policy determination of a kind clearly for nonjudicial discretion' " in order to determine whether the plaintiffs' requested injunction is appropriate inasmuch as this court need only look to the Apology Resolution and, additionally, the related state legislation, as discussed *supra*. Lastly, were this court to grant the plaintiffs' requested injunctive relief, this court would not be "undertak[ing] an 'independent resolution without expressing lack of the respect due coordinate branches of government' " because, as previously indicated, the question whether an injunction is warranted in this case is the kind of question traditionally reserved for the courts.

Therefore, we agree with the plaintiffs that "the [trial c]ourt's analysis and citations miss[ed] the mark because [the plaintiffs are] not seeking a judicial resolution of the underlying claim for a return of lands, but [are] rather asking the judiciary to protect the trust assets while the dispute is being resolved by the politi-

cal branches. This modest goal is well within the domain of the judiciary[.]" Accordingly, we hold the trial court incorrectly determined that the claims presented by the plaintiffs in this case—to the extent they seek injunctive relief—were barred by the political question doctrine.

F. *The Plaintiffs' Requested Injunction*

As previously stated, the trial court—although not required—concluded that the defendants had the explicit authority under the Admissions Act and the Hawai'i State Constitution to alienate the ceded lands. Having so concluded, the trial court summarily denied the plaintiffs' claim for injunctive relief, reasoning only that,

> for injunctive relief to issue on [the p]laintiffs' claim seeking a permanent injunction based on the allegation that sales of ceded lands constitute a breach of trust, [the p]laintiffs must first prevail on the merits of the underlying cause of action. The [trial] court only reaches the issue of "balance of irreparable harm" and "public interest in support" if the plaintiffs prevail on the merits.

The plaintiffs assert that the trial court erred in denying their request for injunctive relief because it was not necessary to first "resolve whether the State received 'good title' to grant injunctive relief in this case." As previously discussed, the plaintiffs' request for injunctive relief is grounded in their view that the "recognition in [the Apology Resolution and Acts 354 and 359] of the illegality of the transfer of [the ceded] lands and the ongoing reconciliation and negotiation process dramatically reinforces the State's fiduciary

obligation to protect the corpus of the [p]ublic [l]and [t]rust until an appropriate settlement is reached." Additionally, the plaintiffs maintain that injunctive relief is critical to their ability to "protect the status quo before these [c]eded lands are lost and the [n]ative Hawaiian people suffer irreparable harm." The OHA plaintiffs cite to a number of international situations that they claim "illustrate[ ] that a moratorium on governmental action is appropriate to protect the rights of the natives while efforts to reach a proper settlement are underway."[25] The individual plaintiffs suggest that this court should look to general trust law for guidance in determining whether to issue an injunction and that trust law mandates that an injunction be issued inasmuch as any sale or transfer of the illegally obtained ceded lands by the State would constitute a breach of its fiduciary duties to preserve the assets of the public lands trust until a settlement is reached.

The defendants maintain that the trial court correctly denied the plaintiffs' request for injunctive relief because the plaintiffs have not shown they can prevail on the merits. Specifically, the defendants argue that "the State has the undoubted and explicit power to sell [c]eded [l]ands pursuant to the terms of the Admission Act and pursuant to [s]tate law.[26] [The p]laintiffs have

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[25] Although we recognize that international law and situations cited by the plaintiffs provide support for their requested injunction, we do not believe it is necessary to engage in a discussion of these issues inasmuch as our holding is grounded in Hawai'i and federal law.

[26] The defendants assert that there are five "reasons or bases" for the State's "unchallenged power to sell" the ceded lands: (1) "enabling acts generally and historically have afforded the power to sell to new states"; (2) "the Admission Act specifically

completely failed to show any basis for deviating from the terms of the trust or for finding that applicable [s]tate laws are unconstitutional or void." The defendants also argue that "the plaintiffs in our case specifically disclaim title to the [c]eded [l]ands. There simply are no 'merits' on which plaintiffs did or could prevail." The defendants further assert that "the unprecedented nature of the plaintiffs' request is highlighted by their use of the term 'moratorium.' It is not even clear whether this term is supposed to mean something different from 'injunction,' and if so, what."

The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction. *Life of the Land v. Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978); *see also Morgan v. Planning Dep't, County of Kauai*, 104 Hawai'i 173, 86 P.3d 982 (2004). However, as observed by the Intermediate Court of Appeals in *Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw.App. 272, 630 P.2d 646 (1981), "[t]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits." *Id.* at 276, 630 P.2d at 650 (citations omitted). As pointed out by the parties and the trial court, "[n]o reported Hawai'i case discusses the requirements for entry of a permanent injunction."

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grants the power to sell"; (3) "the Hawai'i Constitution confirms the power to sell"; (4) "state statutes embody the power to sell"; and (5) "the Hawai'i Supreme Court has previously held that the State has power to sell."

However, we agree with the trial court that "it is generally held that '[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.' "[27] Accordingly, we believe that the appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction.

Thus, where a permanent injunction is sought from an appellate court, the first element of the test is necessarily concerned with whether the plaintiffs have prevailed on the merits of the appeal. *See Indian Motorcycle Assocs.*, 66 F.3d at 1249. Having held that the Apology Resolution and related state legislation give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved, we believe the plaintiffs, as a matter of law, have succeeded on the

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[27] *See, e.g., Indian Motorcycle Assocs. III Ltd. P'ship v. Massachusetts Housing Fin. Agency*, 66 F.3d 1246, 1249 (1st Cir. 1995):

> Four principal factors govern the appropriateness of permanent injunctive relief: (1) whether the plaintiff has prevailed on the merits; (2) whether the plaintiff will suffer irreparable injury absent injunctive relief; (3) whether the harm to the plaintiff outweighs any harm threatened by the injunction; and (4) whether the public interest will be adversely affected by the injunction.

(Internal quotations marks and citation omitted.)

merits of their claim inasmuch as any future transfer of ceded lands by the State would be a breach of the State's fiduciary duty to preserve the trust res.

Specifically, the language of the Apology Resolution itself supports the issuance of an injunction. As previously discussed, we believe, based on a plain reading of the Apology Resolution, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations. Equally clear is Congress's "express[ed] ... commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to *provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphasis added). Accordingly, the Apology Resolution dictates that the ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people. Without an injunction, the ceded lands are at risk of being alienated and, as previously stated, once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians and will, as discussed more fully *infra*, undoubtedly have a negative impact on the contemplated reconciliation efforts.

The plaintiffs' argument that an injunction is necessary to preserve the status quo pending the resolution of the native Hawaiians' claims to the ceded lands is further supported by the Justice and Interior Departments' report, entitled "From Mauka to Makai: The River of Justice Must Flow Freely." As previously

stated, the report states: "As [a] matter of justice and equity, this report recommends that [n]ative Hawaiian people should have self-determination over their own affairs within the framework of [f]ederal law, as do Native American tribes." (Format altered.) (Emphases added.) Moreover, the Departments asserted that, "[t]o safeguard and enhance [n]ative Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify [n]ative Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative [n]ative Hawaiian governing body."

More importantly, the state legislature itself has announced that future reconciliation between the State and native Hawaiians will occur. The Hawai'i legislature, in Acts 359 and 329, discussed *supra*, recognized that "the indigenous people of Hawai'i were denied ... their lands," 1993 Haw. Sess. L. Act 359, § 1(9) at 1010 (creating a Hawaiian Sovereignty Advisory Commission), and contemplated further action by the legislature to reach a "lasting reconciliation so desired by all people of Hawai'i." 1997 Haw. Sess. L. Act 329, § 1 at 956. Although Act 359, which created the Hawaiian Sovereignty Advisory Commission, did not specifically address the issue of native Hawaiians' title to ceded lands, the stated purpose of the Act was to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." 1993 Haw. Sess. L. Act 359, § 2 at 1010. As previously stated, Act 354 recognized that "[m]any native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-

government as do other native American peoples." 1993 Haw. Sess. L. Act 354, § 1 at 1000. Moreover, the legislature "acknowledged that the actions by the United States were illegal and immoral, and pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." *Id.* Additionally, in Act 329, the legislature indicated that it was moving "*toward a comprehensive, just, and lasting resolution*" regarding native Hawaiian claims to the ceded lands. 1997 Haw. Sess. Law. Act 329, § 1 at 956 (emphasis added).

The governor, herself, has indicated her commitment-and, by association, that of the executive branch-to settling the native Hawaiians' claims to the ceded lands. On January 21, 2003, in her "State of the State Address," Governor Lingle stated, "Here at home in Hawai'i[,] I will continue to work with you [*i.e.*, the members of the legislature] and with the Hawaiian community to resolve the ceded lands issue once and for all." Linda Lingle, Governor, State of Hawai'i, *State of the State Address: An Outline of the Governor's Agenda* (Jan. 21, 2003).

Also, as previously noted, testimony was adduced at trial that the State has been following a self-imposed moratorium since 1994 on the sales of ceded lands until a resolution of the present lawsuit. Such a self-imposed moratorium leads to an inference that questions regarding the title to the ceded lands exist and, additionally, that the State is apparently able to comply with its duties as public lands trustee without having to alienate the ceded lands.

In sum, all of the aforementioned pronouncements indicate that the issue of native Hawaiian title to the

ceded lands will be addressed through the political process. In this case, Congress, the Hawai'i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever. For present purposes, this court need not speculate as to what a future settlement might entail-i.e., whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement. In other words, the aforementioned pronouncements as they relate and impact the plaintiffs' claim for injunctive relief clearly support the plaintiffs' position that the State has a fiduciary duty as trustee to protect the ceded lands pending a resolution of native Hawaiian claims. As such, we believe that the plaintiffs have met the first prong of the three-part test for issuance of a permanent injunction, *i.e.*, prevailing on the merits of their claim.

The second prong of the test for an injunction is whether "the balance of irreparable damage favor[s] the issuance of a temporary injunction." *Life of the Land*, 59 Haw. at 158, 577 P.2d at 1118. Obviously, without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts contemplated by the Apology Resolution, Acts 354, 359, and 329, and Governor Lingle. Although an argument could be made that monetary reparations would be the logical remedy

for such loss, we are keenly aware—as was Congress—that "the health and well-being of the [n]ative Hawaiian people is intrinsically tied to *their deep feelings and attachment to the land*[.]" Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (emphasis added). Indeed, as more eloquently stated by the trial court:

> The [n]ative Hawaiian [p]eople continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices and institutions. "The health and well-being of the [n]ative [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land." [(Citing in a footnote to the Apology Resolution.)] *'Aina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople-to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. 'Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable.* The natural elements-land, air, water, ocean-are interconnected and interdependent. *To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.* The 'aina is part of their 'ohana, and they care for it as they do for other members of their families. *For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.*

(Footnotes omitted.) (Emphases added.)

Moreover, testimony adduced at trial further supports and underscores the importance of the land to native Hawaiians and to their continued "cultural identity

... spiritual and traditional beliefs, customs, practices, language, and social institutions," Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, as well as the historical and cultural reasons therefor. For example, David H. Getches, a professor at the University of Colorado School of Law, was called to testify as the plaintiffs' expert. Getches testified that he was a member of the editorial board for the 1982 edition of the *Felix Cowen's Handbook of Federal Indian Law*, considered "one of the leading treatises on Indian law," and authored the chapter on native Hawaiians. He was qualified as an expert in the field of "natural resources law," without objection. With regard to the ceded lands, Getches testified:

> Q [By plaintiffs' counsel] You have said that preventing ceded lands from being transferred would keep the claims situation from becoming more complicated, preserve flexibility, and be consistent with the intent of Congress and the state legislature. Based on your knowledge of the history of native Hawaiian claims[,] what is so special about these lands?
>
> A [By Getches] I think that *what is special about these claims is that this is land that has a pedigree tracing back to a disposition of the Hawaiian people at the time of the overthrow.* This is highly unusual to be able to trace this much land still in public ownership back to the time of dispossession, the very root of these claims.
>
> Secondly, this is land which my understanding is has been traditionally used in some places by native people for traditional purposes.

Third, *it is land that was granted to the State only on specific conditions that demand fiduciary responsibility.* So there is certainly something special about those lands when it comes to their use and disposition in the future.

Further, I think that it is notable that the objection to the use of these lands is coming now by the only legally constituted voice for the present day successors to the people who were dispossessed. *This is a remarkable claim in this case.* And I think those reasons all support the conclusion that there is something special about these lands.

....

Q Can a political entity have governance without having any territory?

A *It is very difficult to have sovereignty without land.* There are some exceptional examples. Israelites before there was an Israel had a notion of governance. It is very difficult for a government to operate without territorial boundaries.

Q Is governance important? Is land important to native people for cultural survival as well?

A Yes. As I indicated, there are traditional uses of land, and in particular the land you were asking me about, that make it especially important. Land generally for native people—I am now speaking based on my knowledge of Indian tribes throughout the United States and the ones I have worked with—*land is generally extremely important as the very root of their culture. It is the homeland. It provides*

> *the basis for self determination, self expression. It is a source of identity. Who we are. As a people.* As people have said it to me. *It is a connection,* as well, *to one's cultural roots,* going back to the ancestors that can be felt and who were known and the ancestors who were unknown and exist only in the spiritual world. That connects present day communities with one another, within those cultural roots. So *the land is symbolic* for that, whether it is for burial places or just the feeling that this is the place of importance.
>
> Finally, *it is important for spiritual fulfillment, something we as non native people don't feel, is the importance of place in a spiritual way.* I love certain places that I go and some that I own. But it is really quite different, having the land, water, nature connection that native people have. I don't like generalizations about native groups. And what is common among them. *This is the only generalization I have found in over thirty-some years that holds up, that is, that there is a special spiritual connection with land among all native groups that I know.*

(Emphases added.)

Olive Kanahele was called as a witness by the plaintiffs. She holds a bachelor of arts degree in Hawaiian Studies and is a "kumu hula" or dance teacher. In addition to teaching dance, *i.e.*, the hula, Kanahele described learning about ancient Hawaiian chants and testified specifically regarding chants that tell the story of Pele and Hiiaka, deities of the life cycle. According to Kanahele,

Pele comes and she erupts and her lava goes all over the lands and also extends land. And Hiiaka comes along and her function as the egg child ... is to allow things to grow on the land. And so she's the healer of the family and she heals the lands and things begin to grow. And as the things begin to grow, then it becomes suitable for ... humans ... to live on.

When asked about "the land," Kanahele testified:

The land itself ... is the deity, Pele. The land itself was made from fire and it comes from out of the earth. And, you know, I can give you a little geneaology [sic] of the Pele family. The Pele family comes from-the mythological geneaology [sic] of the Pele family is that the mother is Haumea, she is the Mother Earth, she is the earth and all of these children are born from different parts of her.

....

Pele ... is born from the natural channel of a female, she comes from the womb. And so ... her responsibility is to go back into the womb of the mother and-and bring out all of these things that we call land, that we call magma and lava and eventually will become land.

One of the-one of the most amazing literary work that we have is the kumulipo.... The kumulipo spans generations of people.... And the first era of the kumulipo, the very first line of the kumulipo talks about the making of the earth....

....

> ... And why does it have to be earth, you ask me?
>
> ....
>
> It has to be earth because as man we need-we need land to live on. That is-that is our foundation. *And for the native Hawaiian, more than the family, land is their foundation. Land is their identity.*

(Emphases added.) Based on the foregoing, we believe the second prong of the test for an injunction, *i.e.*, irreparable damage, has been met. *Life of the Land*, 59 Haw. at 158, 577 P.2d at 1118.

The last prong of the test for an injunction is whether "the public interest supports granting an injunction." *Id.* Here, we need look no further than the legislative pronouncement contained in Act 329, declaring that a "lasting reconciliation [is] desired by all people of Hawai'i," 1997 Haw. Sess. L. Act. 329 § 1 at 956, to conclude that the public interest supports granting an injunction.

We firmly believe that, given the "crucial importance [of the 'aina or land to] the [n]ative Hawaiian people and their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being," any further diminishment of the ceded lands (the 'aina) from the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State.

It is well-settled that a "[s]ettlement is an agreement to terminate, by means of mutual concessions, a claim that is disputed in good faith ... and is designed to prevent or put at end to litigation." *Rearden Family*

Trust v. Wisenbaker, 101 Hawai'i 237, 251, 65 P.3d 1029, 1043 (2003) (internal quotation marks, original brackets, citation, and footnote omitted). The continued diminishment of the public lands trust means that any land sold or transferred to third parties will be lost and, thus, unavailable for settlement purposes. As such, native Hawaiians would be placed in an unfair and disadvantaged position inasmuch as they may, ultimately, be forced to accept less-than-desirable settlement terms and make concessions that they would not have otherwise made had certain ceded lands, for example, been kept in the public lands trust. Moreover, the State, acting as both the trustee of the land (with the power to alienate it) and a major participant in the negotiation process, would be in a more advantageous position and have greater bargaining power. In our view, enjoining the defendants from selling or otherwise transferring to third parties any ceded lands from the public land trust until the claims of the native Hawaiians to those lands are resolved and, thus, preserving the status quo and the trust res, would help in leveling the playing field during the pendency of settlement negotiations and reconciliation process contemplated by the Apology Resolution and related state legislation discussed supra. *Cf. Hosp. Klean of Tex., Inc. v. United States*, 65 Fed. Cl. 618 (2005) (finding lost opportunity to compete for contract on level playing field sufficient to constitute irreparable harm for purpose of issuing temporary restraining order); *Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. 849, 867 (N.D. Ill. 1996) (injunction issued to level the playing field of the parties).

Finally, as indicated by the plaintiffs, their request for an injunction is further supported by the United States Supreme Court's decision in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 39 S. Ct. 185, 63 L. Ed. 504

(1919). In *Lane*, the plaintiff, "an Indian town," brought a claim seeking to enjoin certain governmental officials from "offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States." 249 U.S. at 111, 39 S. Ct. 185. The plaintiffs alleged two grounds for their suit: (1) "that under the laws of Spain and Mexico it had, when that region was acquired by the United States, and under the provisions of the treaty it now has, a complete and perfect title to the lands in question"; and (2) "that in disregard of its title the defendants are threatening and proceeding to offer, list and dispose of these lands as public lands of the United States." *Id.* The court "of first instance" granted the defendants' motion to dismiss. Id. On appeal, the Court of Appeals of the District of Columbia held that the plaintiff's claims entitled it to relief and granted its requested permanent injunction. *Id.* The defendants challenged the Court of Appeals' decision. Although, ultimately determining that the Court of Appeals should not have granted the permanent injunction because that proceeding did not afford the defendants the opportunity to answer the merits, the Court observed:

> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly[,] it would not justify the defendants in treating the lands of these Indians—to

> which, according to the bill, they have a complete and perfect title, as public lands of the United States and disposing of the same under the public land laws. *That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers* in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court[.]

Lane, 249 U.S. at 113, 39 S. Ct. 185 (emphasis added) (footnote omitted). The Court held that

> "the decrees of both courts below should be reversed and the case remanded to the court of first instance, with direction to overrule the motion to dismiss, to afford the defendants an opportunity to answer the bill, [and] *to grant an order restraining them from in any wise offering, listing or disposing of any of the lands in question pending the final decree* [ ]."

Id. at 114, 39 S. Ct. 185 (emphasis added).

As the defendants in this case point out, the facts in the instant case differ from those in *Lane* inasmuch the plaintiffs do not assert that they have "complete and perfect title" and do not "seek judicial resolution of any controversy," as well as the fact that "*Lane* considered only the executive branch's power to deal with Indian land." Nevertheless, *Lane* is instructive to the extent that it demonstrates the Court's rationale for ordering that injunctive relief be granted pending a final resolu-

tion of claims. The fact that *Lane* involved a judicial resolution for a controversy versus a legislative resolution as in the instant case is, in our view, a distinction without a difference.

Based on the foregoing discussion, we conclude that the plaintiffs have established that injunctive relief is proper pending final resolution of native Hawaiian claims through the political process. Accordingly, we hold that the trial court erred in denying the plaintiffs' request for injunctive relief.

G. *The Plaintiffs' Remaining Contentions*

In light of the above discussion, we need not address the OHA plaintiffs' remaining contentions regarding declaratory relief or certain evidentiary rulings made by the trial court.

IV. *CONCLUSION*

Based on the foregoing, we hold that: (1) the Apology Resolution and related state legislation, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved; (2) the trial court correctly determined that this court's unpublished decision in *Trustees of the Office of Hawaiian Affairs v. Board of Land and Natural Resources*, No. 19774, 87 Hawai'i 471, 959 P.2d 841 (Haw. Mar. 12, 1998) (mem.), did not collaterally estop the plaintiffs' claims in this case inasmuch as the elements of collateral estoppel, *see Kealhole Def. Coal., Inc. v. Bd. of Land & Natural Res.*, 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006), are not present; (3) the plaintiffs' claim for injunctive relief with regard to the Leiali'i parcel is not barred by sovereign immunity based on our conclusion that the $31 million

expenditure on infrastructure for the Leiali'i parcel had only an ancillary effect-albeit a substantial one-on the state treasury, *see Kaho'ohanohano v. State*, 114 Hawai'i 302, 337, 162 P.3d 696, 731 (2007); (4) inasmuch as the Apology Resolution and related state legislation give rise to a fiduciary duty by the State, as trustee, to preserve the corpus of the public lands trust until such time as the unrelinquished claims of the native Hawaiians have been resolved, the trial court's conclusion that OHA's actions between 1987 and 1994 constituted a waiver of the plaintiffs' claims was clearly erroneous and, therefore, the plaintiffs did not waive their claim for injunctive relief with regard to the Leiali'i parcel; (5) the plaintiffs were not estopped from challenging the transfer of the Leiali'i'i parcel based on their pre-1993 actions because it was not until the Apology Resolution was signed into law on November 23, 1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose; (6) inasmuch as the plaintiffs' requested relief is clearly prospective in nature, the plaintiffs' claims with regard to the sale or transfer of the ceded lands in general are not barred by sovereign immunity; (7) the question whether an injunction is appropriate to allow resolution of the plaintiffs' unrelinquished claims without further diminishment of the trust res is ripe for adjudication; (8) the question whether an injunction should issue presents a type of dispute that is traditionally resolved by the courts and, therefore, does not present a non-justiciable political question; (9) the appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (a) whether the plaintiff has prevailed on the merits; (b) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (c) whether the

public interest supports granting such an injunction; and (10) the plaintiffs have established that injunctive relief is proper pending final resolution of native Hawaiian claims through the political process.

Accordingly, we vacate the trial court's January 31, 2003 judgment and remand this case to the circuit court with instructions to issue an order granting the plaintiffs' request for an injunction against the defendants from selling or otherwise transferring to third parties (1) the Leiali'i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved.

OPPOSITION BRIEF

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FILED

JUL 2 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1372

IN THE

Supreme Court of the United States

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Hawaii

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QUESTION PRESENTED

Whether the Hawaii Supreme Court acted within its authority in relying upon Hawaii's laws and Constitution, as well as principles of trust law and the 1993 federal Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, to impose an injunction on the sale or transfer of the lands conveyed in trust to the State of Hawaii until the ongoing reconciliation process between the state and federal governments and native Hawaiians is completed?

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On Petition for Writ of Certiorari to the Supreme Court of Hawaii

BRIEF OF RESPONDENTS IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

In addition to the two federal statutes mentioned in the Petition,

Hawaii Legislative Act 340 (1993), "An Act Relating to the Island of Kaho`olawe," is reprinted at Appendix A.

Hawaii Legislative Act 354 (1993), "An Act Relating to Hawaiian Sovereignty," is reprinted at Appendix B.

Hawaii Legislative Act 359 (1993), "An Act Relating to Hawaiian Sovereignty," is reprinted at Appendix C.

Hawaii Legislative Act 329 (1997), "An Act Relating to the Public Land Trust," is reprinted at Appendix D.

STATEMENT

The unanimous decision of the Hawaii Supreme Court in this case mentioned seven different sources of law: four Acts of the Hawaii legislature, two Acts of the United States Congress, and the carefully-crafted body of state trust law as applied to Hawaii's Public Lands Trust. Petitioners' claim before this Court is limited to the assertion that the decision below misread one of the two federal acts, the 1993 Apology Resolution, a Resolution that was enacted after three of the four Hawaii laws at issue in the case and that duplicated those very laws. *See* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) (the "Apology Resolution").[1]

The 1993 Hawaii statutes that form the essence of the Hawaii Supreme Court's decision in this case were a long-overdue reaction to the overthrow of the Kingdom of Hawaii exactly one hundred years earlier, in 1893. In 1898, when Hawaii was annexed, the Republic of Hawaii "ceded all former Crown, government, and public lands to the United States." *Rice v. Cayetano*, 528 U.S. 495, 505 (2000) (*citing* the Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898) (hereafter cited as Annexation

[1] The Petition does not assert a violation of the 1959 federal Admission Act, Pub.L.No. 86-3, 73 Stat. 4.

Resolution)). However, the United States treated these lands as separate from other public lands, requiring their revenues "to be 'used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.'" *Id.* (quoting from the Annexation Resolution). In 1899, the U.S. Attorney General opined that the Annexation Resolution had placed these lands (about 1.8 million acres) in a "special trust" for the benefit of Hawaii's people. Hawaii–Public Lands, 22 U.S. Op. Atty. Gen. 574, 1899 WL 577 (1899).

Subsequently, in the 1959 Hawaii Admission Act, Pub.L.No. 86-3, 73 Stat. 4 (the "Admission Act"), Congress stated five purposes for which the lands in the trust could used. One of these was "for the betterment of the conditions of native Hawaiians" *Id.*, Section 5(f). Congress also affirmed that it would be up to the State of Hawaii to determine how to manage these lands: "Such lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes *in such manner as the constitution and laws of said State may provide*, and their use for any other object shall constitute a breach of trust." *Id.* (emphasis added.) In 1978, the people of Hawaii clarified the State's trust obligation to native Hawaiians during a Constitutional Convention, and the Office of Hawaiian Affairs (OHA) was created to manage proceeds derived from the lands held in trust and designated for the benefit of native Hawaiians. Pet.App. 6a-7a (*quoting from Office of Hawaiian Affairs v. State,* 110 Hawai`i 338, 340-41, 133 P.3d 767, 769-70 (2006)).[2]

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[2] The annual amount of revenue received by OHA each year is still under negotiation, but in 2006, the Hawaii Legislature

In the spring of 1993, the year marking the 100th anniversary of the overthrow of the Kingdom of Hawaii, the Hawaii State Legislature passed three related statutes:

- The first was Act 340 (1993), "An Act Relating to the Island of Kaho`olawe." It established the Kaho`olawe Island Reserve Commission, and stated that the island of Kaho`olawe (which had been used by the Navy for training purposes, and was in the process of being returned from the federal government to the State) "shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii." Hawaii Revised Statutes, sec. 6K-9; Appendix A.
- The second was Act 354 (1993), "An Act Relating to Hawaiian Sovereignty." It set forth the facts of the 1893 overthrow and 1898 annexation, and stated that the Hawaii State Legislature "has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." Appendix B.
- The third was Act 359 (1993), "An Act Relating to Hawaiian Sovereignty." Its Findings section again provided the facts related to the 1893 overthrow and the 1898 annexation, empha-

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passed Act 178, setting the annual payment to OHA at $15.1 million.

> sizing that the activities taken by U.S. diplomatic and military representatives to support the overthrow of the Kingdom occurred "without the consent of the native Hawaiian people or the lawful Government of Hawaii in violation of treaties between the two nations and of international law," and characterizing these acts as "illegal." Act 359, sec. 1 (6-7), Appendix C. The Act went on to observe that the 1898 annexation of Hawaii was "without the consent of or compensation to the indigenous people of Hawaii or their sovereign government," and that as a result of the annexation, "the indigenous people of Hawaii were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands, and their ocean resources." *Id.*, sec. 1(9). The Act declared its main purpose to be to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing," *id.*, sec. 2, and outlined a process designed to promote that goal.

Only after the State of Hawaii enacted these three statutes into law did the United States Congress, in November 1993, pass "a Joint Resolution recounting the events [relating to the overthrow] in some detail and offering an apology to the native Hawaiian people." *Rice,* 528 U.S. at 505 (*citing* Apology Resolution). The Apology Resolution's findings directly mirrored those of the three statutes that Hawaii had just recently passed.[3] In light of these

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[3] Specifically, the Apology Resolution recognized that due to "the illegal overthrow of the Kingdom of Hawaii," Hawaiian lands were taken from the Kingdom and the native Hawaiian people

findings, Congress "express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." 107 Stat. at 1513.

Following the above spate of state and federal legislation, four years later the Hawaii Legislature enacted Act 329 (1997), "An Act Relating to the Public Land Trust," which was designed to clarify the proper management of the lands in the Trust. *See* Appendix D. The Act stated that "the events of history relating to Hawaii and Native Hawaiians, including those set forth in [the federal Apology Resolution] continue to contribute today to a deep sense of injustice among many Native Hawaiians and others." *Id.* It explained that "the people of Hawaii, through amendments to their state constitution, the acts of the legislature, and other means, have moved substantially toward [a] reconciliation." *Id.* In addition, the Act identified its "overriding purpose" as "to continue this momentum, through further executive and legislative action in conjunction with

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"without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government," 107 Stat. at 1512; that the overthrow "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and deprived Native Hawaiians of their rights to "self-determination," *id.* at 1513; that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," *id.* at 1512; and that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions," *id.* at 1512-1513.

the people of Hawaii, toward a comprehensive, just, and lasting resolution." *Id.* Importantly, the Act also stated that Congress' Apology Resolution provided a correct recounting of "the events of history relating to Hawaii and Native Hawaiians." *Id.*

The fact findings set forth in these four Hawaii statutes—the three from 1993, preceding the Apology Resolution, and the fourth postdating it in 1997—were repeatedly and directly relied upon by the Hawaii Supreme Court in the opinion upon which certiorari is sought. Pet.App. at 35a-39a, 86a-87a. Although at one point the Hawaii Supreme Court characterized Respondents as relying "largely" upon the Apology Resolution, Respondents referred repeatedly to these state grounds below, and, of course, the Hawaii Supreme Court explicitly relied on these sources of State law at every turn. The Opening Brief filed by the Office of Hawaiian Affairs in the Hawaii court referred, for instance, to Act 340 (1993) (codified as Hawaii Revised Statutes, sec. 6K-9) at pages 35-36 and 38; to Act 359 (1993) at pages 2, 4, 11, 15, 26, 34, 35, and 38; and to Act 329 (1997) at pages 2-3, 11, 15, 22, 26, 35, and 38-39 (and both Acts 359 (1993) and 329 (1997) were attached to the Opening Brief as appendices). The first sentence in the Individual Plaintiffs' Opening Brief to the Hawaii Supreme Court stated: "The central issue in this case is whether, in light of the admissions in Act 354 (1993), Act 359 (1993) and the Apology Resolution (collectively referred to as the "1993 Legislation"), the State would breach fiduciary duties if it sold ceded lands before the Hawaiians' claim to ownership of the ceded lands is resolved." Thereafter, "1993 Legislation" was cited 30 times in Individual Plaintiffs' Opening and Reply Briefs. Both Act 354 (1993) and Act 359 (1993) were included in the appendices of the

Opening Brief filed by the Individual Plaintiffs. In combination with Hawaii judicial precedent and Hawaii trust law, the Hawaii statutes provided an explicit, independent state-law basis for the court to enjoin the State of Hawaii from selling the lands held by the State in the Public Land Trust until the claims of native Hawaiians are addressed and the ongoing reconciliation process is completed.

Basic common law principles of Hawaii trust law provided the Hawaii court with the authority to protect the trust corpus, and the factual findings of the Hawaii statutes (like those of the federal Apology Resolution, which mirrored them) reaffirmed the need to ensure that the corpus remains when a settlement is reached as to these claims.

Accordingly, both the text and reasoning of the Hawaii Supreme Court's opinion provide independent and adequate—indeed, crucial and central—state grounds supporting the Hawaii court's holding and its remedy.

ARGUMENT

In requesting that this Court grant certiorari, petitioners attempt to manufacture a federal question and interest where none exists, and ignore the obvious existence of adequate and independent grounds for the Hawaii Supreme Court's decision. Congress and the Hawaii legislature have found as a matter of fact, and even petitioners do not and cannot dispute, that the claims of native Hawaiians resulting from the illegal overthrow of their ancestors' government have never been resolved or relinquished.

Based on these undisputed facts, the Hawaii Supreme Court ensured that assets from the state's

Public Land Trust—one of the stated purposes of which is the "betterment of the conditions of native Hawaiians"—will remain available for such a resolution. Now, petitioners seek to shoehorn Congress's laudable decision to join the Hawaii legislature in recognizing well-settled historical realities into a basis for inviting this Court to meddle in what are quintessentially state-level affairs. That they seek to do so in a case where there is not even a hint of a conflict among the lower courts, and one in which the decision below is correct, only underscores the inappropriateness of this Court's review.

I. THIS COURT'S REVIEW IS UNWARRANTED BECAUSE THE HAWAII SUPREME COURT'S DECISION RESTED FIRMLY UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

There is no split among the lower courts on the issue presented in this case, and Petitioners do not even attempt to suggest one. Instead, they suggest that the legal issue is so important that this Court must interrupt the ongoing dispute resolution process in the State of Hawaii to intervene, preempt that process, and decide that issue itself. Even assuming Petitioners were right about this (and they are not), this Court's review is not warranted and would yield at best an advisory opinion. This is so because the Hawaii Supreme Court's decision was clearly based on adequate and independent state grounds—grounds drawn from Hawaii's Constitution, statutes, and case law, most prominently its common law of trusts. Moreover, no issues involved in the Apology Resolution or the state materials examined in the opinion below have relevance outside Hawaii.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). *See also* Eugene Gressman et al., *Supreme Court Practice* 208 (9th ed. 2007) (describing the rationale behind the doctrine). As Justice Scalia has explained, "[a]pplication of the 'independent and adequate state ground' doctrine . . . is based upon equitable considerations of federalism and comity." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). All that is required for the doctrine to apply to preclude review is that "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate adequate, and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That is the case here.

Had there never been a federal Apology Resolution, the Hawaii court could and would have reached the very same result and imposed the same remedy, upon the very same fact findings.[4] Not only do the four Hawaii statutes together make a set of factual findings that perfectly parallel those of the federal statute, but one of them actually formally *incorporates* the federal statute's factual findings—explicitly confirming that the Apology Resolution provides a correct recounting of "the events of history

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[4] Notably, Petitioners do not even argue otherwise. They instead offer an argument about state *political* processes. This assertion is examined *infra* p. 17.

relating to Hawaii and Native Hawaiians." Act 329, Sec. 1, Appendix D.

The Hawaii court, faced with facts suggesting that the State was finally prepared to acknowledge and satisfy its obligations to native Hawaiians, was within its power to ensure the trust would have the resources to meet them. That power did not derive from the Apology Resolution, and the Hawaii Supreme Court never once said that it did. Instead, the Hawaii Supreme Court merely noted that the Apology Resolution supported, as did the Hawaii statutes, the court's reasonable belief that the trust assets would need to be called upon in the near future and should be available; making them unavailable, the court logically concluded, would be a breach of fiduciary duty on the part of the trustee. The court cited "related state legislation," referring to the four Hawaii statutes, for every holding in its opinion. The Hawaii Supreme Court did discuss the Apology Resolution in some detail, but immediately followed this discussion with the statement that "[t]he above interpretation is also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution—specifically Acts 354, 359, 329, and 340." Pet.App. at 35a.

Thus, even if the Court were to grant certiorari and rule in favor of the State of Hawaii, on remand the Hawaii Supreme Court would simply reach the very same result (this time without citation of the Apology Resolution) and impose the very same remedy, once again—a dead giveaway that the application of the "adequate and independent state grounds" doctrine is required here. *See California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J.) (dismissing certiorari as improvidently granted) ("Were we to review

the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the [California] court would still reverse [the defendant's] conviction on state statutory grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid.") (citation omitted); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Even if the Idaho and federal statutes contained identical language . . . the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts.").

A. This Case Concerns State Trust Law, and Only Tangentially Involves the Factfindings of the Apology Resolution.

The Hawaii court's crucial conclusion, which caused it to impose its remedy of freezing the trust assets, is grounded primarily in Hawaii's trust law. Hawaii law establishes that native Hawaiians are beneficiaries of the Public Land Trust, and that the Respondents, the Office of Hawaiian Affairs (OHA), "can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust." Pet.App. at 41a. It is the "well-settled" law of Hawaii that native Hawaiians have "a right to bring suit under the Hawai`i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust"; "that the State, as trustee 'must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries"; that "[i]ts conduct . . . should therefore be judged by the most exacting fiduciary standards"; and that therefore the Hawaii Supreme Court "will strictly scrutinize the actions of the government." Pet.App. at 39a-40a (quotations and citations omitted). In so doing, the Court measures

the State's trust duties by "the same strict standards applicable to private trustees." *Pele Defense Fund*, 73 Haw. 578, 605 n.18, 837 P.2d 1247, 1264 n.18 (citation omitted).

Applying those fiduciary standards, the Hawaii court concluded that "we believe that Plaintiffs, as a matter of law, have succeeded on the merits of their claim inasmuch as any future transfer of ceded lands by the State would be a breach of the State's fiduciary duty to preserve the trust res." Pet. App. at 84a-85a. Based on well-substantiated fact-findings at both the state and federal level, and the stance of Hawaii's governor, all concurring that a settlement with native Hawaiians of still-live claims was desirable and should occur, the Hawaii court chose to impose a remedy that would allow that settlement to ultimately be paid out.

Given this classic state-law trusts analysis, informed by perfectly-concurring statutory findings at both the state and federal level, it would require some straining to view this case as even raising a federal question, let alone a question that warrants this Court's review.[5]

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[5] Indeed, the Hawaii court rested its conclusion that an injunction should issue on the findings of the trial court regarding the importance of land (`aina) to native Hawaiians, which were based on testimony presented in trial by Dean David H. Getches of the University of Colorado School of Law and the Hawaiian expert on chants and hula, Olive Kanahele. Pet.App. at 89a-94a. After reviewing this testimony, the court concluded:

> We firmly believe that, given the "crucial importance [of the `aina or land to] the [n]ative Hawaiian people and their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being," any further diminishment of the ceded lands (the `aina) from

B. The Concurring Fact Findings of the State Statutes and Federal Apology Resolution Each Provided Independent, Parallel Support for the Court's Trust Remedy.

This case is, at its core, about Hawaii trust law. Yet to the extent that it does touch on statutes—to accept their factual findings—it exhibits a parallel reliance upon both Hawaii and federal statutes. That parallel reasoning provides another strong reason for this Court to find independent and adequate state grounds for the Court's ruling.

Throughout its opinion, every time the Hawaii court discusses the Apology Resolution, it also—and more heavily—relies on the four parallel Hawaii statutes discussed above, referred to both by number and as "related state legislation." *See, e.g.*, Pet.App. at 27a, 35a, 41a; *see also* 82a n. 25 ("[O]ur holding is grounded in Hawaii and federal law"), 98a. These state statutes are fully independent of the federal Apology Resolution; indeed, three of them preceded it. Accordingly, in reaching the conclusion that it was appropriate to issue an injunction, the Hawaii Court referred to the 1993 Apology Resolution, but also stated that, "*[m]ore importantly*," "the state legislature itself" had set the stage for such an injunction in the four key Hawaii statutes. Pet.App.

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the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State.

Id. at 94a (*quoting from* the trial court's findings). The Hawaii court's decision was thus based on findings reached after a several-week trial and numerous witnesses, and the federal Apology Resolution played only a tangential supporting role in its ultimate decision.

at 86a (emphasis added). The Court added that "[t]he governor, herself" had also made a "commitment" to reaching a settlement, which would be facilitated by the injunction, *id.* at 87a; summarized factual conclusions that were recognized by "Congress, *the Hawaii state legislature*, the parties, and the trial court"; and noted that "Congress, *the [state] legislature*, and the governor have all expressed their desire to reach such a settlement." *Id.* at 88a (emphases added).[6]

If there were any doubt that the Hawaii state law grounds provided an adequate and independent basis for the Hawaii court's actions, it would be resolved by the court's clear statement about Act 329:

> [W]e need look *no further* than the legislative pronouncement contained in Act 329, declaring that a "lasting reconciliation [is] desired by all people of Hawai`i," 1997 Haw. Sess. L. Act. 329

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[6] In its brief to the Hawaii Supreme Court in this case, the State of Hawaii did not challenge any of the factual findings in the Apology Resolution or the relevant state statutes, arguing only that "the Apology Resolution and other legislative enactments do not provide judicially manageable standards for this case" and therefore that it was inappropriate for Hawaii's courts to issue an injunction because of the political question doctrine. *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii (HCDCH)*, State Defendants Appellees Answering Brief 49 (filed with the Hawaii Supreme Court, Oct. 13, 2003). The State's Brief below did quote from Act 329 (1997), *id.* at 50-51, but it failed to mention Acts 340 (1993), Act 354 (1993), and Act 359 (1993) at all, even though the opening briefs filed by the Office of Hawaiian Affairs and the Individual Plaintiffs below both addressed these statutes in some detail.

§ 1 at 956, to conclude that the public interest supports granting an injunction.

Pet. App. at 94a (emphasis added). In sum, there is copious evidence in the Hawaii court's opinion of the clear, express statement of reliance on state grounds that this Court requires.[7]

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[7] In its detailed analysis of the wide range of procedural issues presented by this action, the Hawaii Supreme Court relied almost exclusively on its own prior decisions, such as *Office of Hawaiian Affairs v. State*, 110 Hawai`i 338, 133 P.3d 767 (2006); *Office of Hawaiian Affairs v. State*, 96 Hawai`i 388, 31 P.3d 901 (2001); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); and *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982), which in turn relied on the statutes and Constitution of the State of Hawaii—and not upon the Apology Resolution.

The only section of the opinion that examined federal decisions in any detail is Section III.D.1 (Pet.App. at 63a-69a) on Sovereign Immunity, where the Court examines *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261 (1997), and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). The Hawaii Court was interpreting Hawaii state law governing sovereign immunity and contrasting it with federal law. For example, in Footnote 21, Pet.Br. at 66a, the Court explained that it was relying upon its previous decision in *Pele Defense Fund, supra*, which had adapted the federal rule from *Ex Parte Young*, 209 U.S. 123 (1908), and where the Hawaii Court stated explicitly that it was interpreting and applying "the law in this state." And in Footnote 18, Pet. App. 50a-51a, the Court stated that in the previous cases of *Bush v. Watson*, 81 Hawai`i 474, 482 n.9, 918 P.2d 1130, 1138 n.9 (1996) and *Kaho`ohanohano v. State*, 114 Hawai`i 302, 162 P.3d 696 (2007), it had "decline[d] to adopt the federal courts' narrow view that a claim for relief based on past illegal action is necessarily 'retrospective[],'" thus leaving no doubt that it was interpreting and applying *state* law rather than federal law.

The Petition, however, claims that the decision below interferes with state political processes. The theory is evidently that by mentioning the federal Apology Resolution, the Hawaii Supreme Court's opinion would forever prevent Hawaii's political bodies from reexamining the five sources of State Law (four legislative Acts and Hawaii Trust Law). No support whatsoever is provided for the proposition. And its embrace, in this case or any other, would spell the end of the adequate and independent state grounds doctrine.

This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Every time a state Supreme Court mentions both federal and state sources of law, there is some hypothetical impact on state politics. But this Court has never considered that a basis for granting certiorari, and for good reason. The Court, merely to decide whether to hear the case, is placed in the unenviable position of trying to estimate what effect, if any, the decision has on state politics. And should it decide to hear the case, the fact that this Court has agreed to do so may itself alter the dynamics within the state's political landscape in all sorts of unforeseen ways. Once this Court renders a decision, moreover, the anticipated state political movement may never even materialize, rendering any decision by this Court advisory. Considerations of ripeness, limits on advisory jurisdiction, federalism, and simple prudence together thus all militate against this Court's taking into account the potential impact upon state political processes in its certiorari analysis. The proper path is to hear a case only after the independent state grounds have been removed, either by an intervening state court decision or subsequent state legislation.

Finally, if certiorari were granted, it would only result in a dismissal for lack of Article III standing, because the injury petitioners seek to remedy is not redressable by this Court. Article III standing requires, *inter alia*, that that a plaintiff show redressability, defined as a "'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *McConnell v. Federal Election Com'n*, 540 U.S. 93, 225 (2003) (citations omitted). In *McConnell*, this Court held that one set of plaintiffs—known as the "Paul plaintiffs"—could not fulfill this basic Article III requirement because even if the Court were to grant the relief sought, "it would not remedy the Paul plaintiffs' alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged." *Id.* at 229 (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 32, 105-110 (1998)). Similarly here, even if this Court reversed the Hawaii Supreme Court's opinion to the extent that it relied upon the Apology Resolution, the rest of the holdings would remain unchanged; the order temporarily barring transfers of public lands subject to the trust would continue; and plaintiffs' claimed injury would remain unredressed.

In *Steel Co.*, too, the Court dismissed for lack of standing where the injury complained of would not be redressed by the relief sought. After canvassing all the remedies sought in the complaint, the Court concluded that "[n]one of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request" would serve to redress the plaintiffs' claimed injuries. *Id.* at 105-06. Here, the relief petitioners seek is to free the state trust corpus from the court's order, but that relief cannot be granted by this Court, for the ulti-

mate source of the power to restrain the trust assets comes from state law, of which the Hawaii Supreme Court is the ultimate interpreter.

II. THE UNIQUENESS OF HAWAII'S SITUATION REBUTS THE CLAIM OF THE AMICUS CURIAE STATES THAT THE HAWAII COURT'S DECISION CONFLICTS WITH OTHER RULINGS AND HAS BROADER IMPACT.

Amici Curiae State of Washington et al. claim that the Hawaii court's decision affects them because "every state admitted into the Union since 1802 has received grants of land owned, prior to statehood, by the federal government." *Amicus Curiae* Brief of State of Washington, et al., at 1 The argument starts out properly, recognizing that "[e]ach Admissions Act or Enabling Act has its own terms," *id.* But *amici* then move on to wrongly ignore the profoundly unusual circumstances of Hawaii's land trust—circumstances that render this Court's review of the decision below to be, at best, mere error-correction of a factbound Hawaii issue. Hawaii's situation is unique now, and it has been unique since annexation.

Hawaii was set apart from other land trust arrangements from the very beginning. *See, e.g., Andrus v. Utah*, 446 U.S. 500, 522 n. 4 (1980) (noting Hawaii as one of few exceptions to general pattern in which federal government gave lands to states in consideration, *inter alia*, for the promise not to tax federal lands). In Hawaii's 1898 Annexation Resolution, Hawaii received an individual exemption from existing federal laws dealing with public lands, so that Congress could enact "special laws for [the] management and disposition" of Hawaii's public

lands, and with the understanding that the revenues and proceeds from the public lands would be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In an 1899 opinion, the United States Attorney General interpreted the language in the Annexation Resolution as subjecting public lands in Hawaii to "a special trust." 22 U.S. Op. Atty Gen. 574 (1899). The relationship between the State of Hawaii and the federal government is importantly informed by the unique terms of that trust. See *Papasan v. Allain*, 478 U.S. 265, 289-90 n.18 (1986) ("[T]he interest transferred to the State depends on the federal laws that transferred the interest. . . . [I]f the federal law created a trust with the State as trustee, the State is bound to comply with the terms of that trust.").

In the 1900 Organic Act, Congress provided that the ceded lands would remain in the "possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States[.]" Section 91 of the Organic Act of Hawaii, 31 Stat. 141, 159 (April 30, 1900). In 1977, the Hawaii Supreme Court interpreted the 1900 Organic Act to mean that "Congress provided that the United States would have no more than *naked title* to the public lands other than those set aside for federal uses and purposes." *State v. Zimring*, 58 Haw. 106, 124, 566 P.2d 725, 737 (1977) (emphasis added).

Hawaii's Admission Act, Pet.App. at 113a, is also unique and arose out of the State's distinctive history. As noted above, Section 5(f) sets out the five

purposes of the trust governing the ceded lands, and one of these is the "betterment of conditions of native Hawaiians." Pet.App. at 116a. Importantly, Section 5(f) leaves to the State Constitution and State law the manner and method by which the trust is to be implemented, providing that "[s]uch lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes *in such manner as the constitution and laws of said State may provide* . . ." *Id.* (emphasis added). In other words, the Admission Act authorized Hawaii to develop its own system of law, tailored to its unique situation, to address the management of its own public lands issues. Hawaii did just that—through a Constitutional Convention, the creation of the Office of Hawaiian Affairs, and the development, through the Hawaii Supreme Court, of a line of judicial precedent relating to the Public Lands Trust. *See, e.g., Pele Defense Fund v. Paty, supra; Ahuna v. Dept. of Hawaiian Homelands, supra.* And, of course, as the decision below recognized, Hawaii courts have adopted a high fiduciary standard in cases dealing with the Public Lands Trust and the claims of native Hawaiians—a standard that may not necessarily exist elsewhere. See *supra* pp. 12-13 (discussing *Pele Defense Fund*, 73 Haw. at 605 n.18).[8]

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[8] Today, other states' situations are different from Hawaii's for other reasons as well, such as that they involve a different federal agency and different sets of native peoples. The Bureau of Indian Affairs (BIA) is "responsible for the administration and management of 66 million acres of land held in trust by the United States for American Indian, Indian tribes, and Alaska Natives." *See* http://www.doi.gov/bia/. By contrast, Hawaii still faces the major, valid, unresolved claims of a native people to public lands—claims that are themselves entangled

All of these aspects of the relevant law of Hawaii thoroughly rebut the claim of the *Amicus Curiae* States that this decision is somehow relevant to their own situations regarding their own public lands. They also provide a full explanation not only for why the decision below is unsuitable for this Court's review, but also for why the Hawaii Supreme Court's legal reasoning was correct. Whatever the limits might be on the United States Congress' ability to dictate future terms over land trusts already bestowed, the State of Hawaii—pursuant to terms of the federal Admission Act itself—has the ability to use its state Constitution and laws in its land-use decisions over such property.

There is nothing unusual at all about the Hawaii Supreme Court's decision in this case. Indeed, the findings of fact in the decision below were entirely in line with what the Hawaii court itself had found in prior cases, and the way in which it had interpreted Hawaii's Constitution. In 2001, the Hawaii court held that:

> [T]he State's obligation to native Hawaiians is firmly established in our constitution. . . . [I]t is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, § 7 . . . [W]e trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS § 10-13.5 and enact

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with Hawaii's unique history and that fall outside of the BIA's jurisdiction.

legislation that most effectively and responsibly meets those obligations.

Office of Hawaiian Affairs v. State, 96 Hawai`i 388, 401, 31 P.3d 901, 914 (2001); *see also Office of Hawaiian Affairs v. State*, 110 Hawai`i 338, 366, 133 P.3d 767, 795 (2006) (*quoting from* the 2001 decision). Finally, to the extent that the experience of other land disputes is instructive, it suggests that the decision below was correct.[9]

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[9] For example, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), is similar in many respects to the decision below, and the Hawaii Court viewed the *Lane* precedent as "instructive." Pet.App. at 97a. Pueblo Indians held title to some 460,000 acres in what is now southern Arizona when the United States acquired sovereignty over the surrounding territory from Mexico in 1853. The Indians brought suit to enjoin the United States from "offering, listing, or disposing" of their lands as public lands of the United States. *Id.* at 111.

Just as in this case, the Pueblo Indians were "not seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership." *Id.* at 113. The United States argued in *Lane* that the Indians were "wards of the United States . . . and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection." *Id.* This Court rejected this perspective, holding that even if it were true "it would not justify the defendants in treating the lands of these Indians--to which, according to the bill, they have a complete and perfect title--as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, *but an act of confiscation*." *Id.* (emphasis added).

This Court therefore directed the trial court to grant "an order restraining them [the Secretary of the Interior] from in any wise offering, listing, or disposing of any of the lands in question" until the claims of the Pueblo Indians could be addressed and resolved. *Id.* at 114. The Hawaii Supreme Court

III. THE PRACTICAL IMPACT OF THE DECISION WILL BE LIMITED.

According to Petitioners, "the practical impact of [the Hawaii court's] decision is enormous: it bars the state from prudently managing . . . 1.2 million acres of state-owned land[.]" Pet.Br. at 11. That claim, however, is completely inaccurate—as inaccurate as saying a landlord cannot prudently manage a rental house because she is temporarily forbidden to sell it. In fact, the Hawaii Supreme Court decision in this case found that "testimony was adduced at trial that the State has been following a self-imposed moratorium since 1994 on the sales of ceded lands. . ." Pet.App. at 87a; *see also id.* at 70a. "Such a self-imposed moratorium leads to an inference," the court concluded, "that the State is apparently able to comply with its duties as public lands trustee without having to alienate the ceded lands." *Id.* at 87a. As the court added, quoting from the trial court opinion, "[n]o evidence was presented . . . of any proposed sales of ceded lands other than at Leali`i." Pet.App. at 70a.[10]

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made a similar ruling in this case, protecting the corpus of the trust until the reconciliation process designed to address the unrelinquished claims of the Native Hawaiians can be completed.

[10] The cases cited for support by Petitioners are totally unrelated to the facts here. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (Pet. at 11), involved a grant of certiorari to a case from the United States Court of Appeals for the Tenth Circuit, *not* from a state supreme court, and involved a quintessential federal issue—whether an easement had been retained when the federal government issued land to a private party. *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974) (Pet. at 11), involved the interpretation by a state court of a provision of the U.S. Constitution, the Import-Export Clause,

In the interim, the lands will be managed as usual; they simply will not be transferred. The Order Granting Plaintiffs' Request for an Injunction, approved as to form by Hawaii Attorney General Mark J. Bennett, recognizes past practice and flexibility by allowing the State to "continue its practice of transferring remnants, and issuing licenses, permits, easements and leases concerning ceded lands." *See* June 4, 2008, trial court order, Appendix E.

As explained above, the court's decision merely preserves the status quo, following the State of Hawaii's own self-imposed moratorium—a moratorium that has been in effect for fourteen years already. The Hawaii Supreme Court also found that the process of resolving native Hawaiian claims is underway and will be resolved in a finite time frame. The Hawaii Supreme Court in its opinion found: "For the present purposes, this court need not speculate as to what a future settlement might entail—i.e., whether such settlement would involve monetary payment, transfer of land, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement." Pet.App. at 88a. If that political desire changes, a motion by the State to the court to modify its injunction could be filed. The court's injunction was designed to ensure that an appropriate reconciliation could be developed by the political branches: "[I]njunctive relief granted by this court would allow

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and thus logically called for review by this Court. The opinion below, by contrast, is an interpretation of state laws (and a similar federal law) related to the unique lands of Hawaii by Hawaii's state supreme court.

Congress and/or the state legislature a reasonable opportunity to craft and enforce . . . relevant laws consistent with the congressional and legislative calls for reconciliation and settlement of native Hawaiian claims." Pet. App. at 76a (quotation and citation omitted).

In this case, the decision below merely imposed an injunction on the disposal of lands until the dispute settlement process concluded. Because any aggrieved party could attempt to raise the same issues being litigated here after the litigation has concluded, it would be advisable, even if the issues presented were certworthy, to wait until they are suitably ripe and factually developed for this Court's adjudication. See, *e.g.*, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

Of course, if this Court wanted to examine the proper construction of the Federal Apology Resolution, it will have ample opportunity to do so. This Court had such an opportunity eight years ago in *Rice v. Cayetano*, 528 U.S. 495, 505 (2000). See also *Rice v. Cayetano*, Brief for the United States as *Amicus Curiae*, 1999 WL 569475, at *3-*6. In addition, the Courts of Appeal have recently twice had occasion to interpret the Apology Resolution. In *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. en banc 2006), the Ninth Circuit interpreted the Apology Resolution as follows: "Congress officially apologized to the Hawaiian people and expressed its commitment to 'provide a proper foundation for reconciliation between the United States and the Native Hawaiian people,'" *id.* at 831; and "Congress admitted that the United States was responsible, in part, for the overthrow of the Hawaiian monarchy." *Id.* at 845. In

a concurrence, Judge William Fletcher observed that the Apology Resolution confirmed the "special trust relationship" between the United States and native Hawaiians. *Id.* at 850. The Ninth Circuit also drew upon the Apology Resolution for its factual findings in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281-82 (9th Cir. 2004). In sum, based on recent history, this Court is very likely to have other opportunities to construe the Apology Resolution in the near future.

Additional developments of the issues that surround native Hawaiians and the Apology Resolution are transpiring right now and this Court's review is therefore not warranted at this time.[11] The course of action of allowing the case to percolate is particularly appropriate since no conflict exists among the lower courts on the questions addressed, and because the question on which certiorari is sought is one unique to Hawaii and this case does not present a proper vehicle to decide it in any event.

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[11] Federal law toward native Hawaiians may very well change as well in the next few months, rendering any judicial decision about the Apology Resolution potentially irrelevant. In footnote 7 of the opinion below, the Hawaii Supreme Court summarized the Native Hawaiian Reorganization Act, commonly called the "Akaka Bill," which would further promote the reconciliation process, and noted that it "was passed by the House of Representatives on October 24, 2007," and is "still pending before the United States Congress." Pet. App. 8a.

CONCLUSION

For the reasons presented above, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Act 340

A Bill for an Act Relating to the Island of Kaho`olawe.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the island of Kaho`olawe is of significant cultural and historic importance to the native people of Hawaii. The island had been used as a military target range since 1941. In 1990, the bombing and shelling of the island was halted by Congress and the President of the United States. A federal commission, known as the Kaho`olawe Island Conveyance Commission, was created by Congress to determine the terms of conveyance of the island to the State of Hawaii.

The legislature further finds, because of extensive erosion and other ecological problems, the presence of unexploded ordnance, archaeological and other cultural and historic sites, and the presence of native and endangered flora and fauna, that federal resources, as well as a new management regime are needed to effectively meet the unique challenges of restoring, preserving, and determining the appropriate use of Kaho`olawe.

The legislature recognizes the continuing stewardship role of the Protect Kaho`olawe Ohana.

The purpose of this Act is to establish the Kaho`olawe island reserve commission which shall have policy and management oversight of the Kaho`olawe island reserve. The establishment of the commission will provide a system that recognizes the island's unique challenges and preserves in perpetuity the island's cultural and historic resources for the people of Hawaii.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER
KAHO`OLAWE ISLAND RESERVE

§ -1 Administration of chapter. The Kaho`olawe island reserve commission and the department of land and natural resources shall administer this chapter.

§ -2 Definitions. As used in this chapter, unless the context otherwise requires:

"Commission" means the Kaho`olawe island reserve commission.

"Department" means the department of land and natural resources.

"Island reserve" means the area designated as the island of Kaho`olawe and the submerged lands and waters extending seaward two miles from its shoreline.

"Waters" means the area extending seaward two miles from the shoreline.

§ -3 Reservation of uses. (a) The Kaho`olawe island reserve shall be used solely and exclusively for the following purposes:

(1) Preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual and subsistence purposes;

(2) Preservation and protection of its archaeological, historical, and environmental resources;

(3) Rehabilitation, revegetation, habitat restoration, and preservation; and

(4) Education.

(b) The island shall be reserved in perpetuity for the uses enumerated in subsection (a). Commercial uses shall be strictly prohibited.

§ -4 Powers and duties. The department and other departments and agencies of the State shall be subject to the oversight of the commission with regard to the control and management of the island reserve. Subject to section -6, the department shall:

(1) Adopt rules pursuant to chapter 91 after the commission has approved the rules;

(2) Implement controls and permitted uses for the island reserve;

(3) Enforce this chapter;

(4) Provide administrative support to the commission; and

(5) Authorize such of its employees as it deems reasonable and necessary to serve and execute warrants and arrest offenders or issue citations in all matters relating to enforcement of the laws and rules applicable to the island reserve.

§ -5 Commission. (a) There is established the Kaho`olawe island reserve commission to be placed within the department of land and natural resources for administrative purposes as provided in section 26-35. The commission shall consist of seven members to be appointed in the manner and to serve for the terms provided in section 26-34; provided that:

(1) One member shall be a member of the Protect Kaho`olawe Ohana;

(2) Two members shall be appointed by the governor from a list provided by the Protect Kaho`olawe Ohana;

(3) One member shall be a trustee or representative of the office of Hawaiian affairs;

(4) One member shall be a county official appointed by the governor from a list provided by the mayor of the county of Maui:

(5) One member shall be the chairperson of the board of land and natural resources: and

(6) One member shall be appointed by the governor from a list provided by native Hawaiian organizations.

(b) The governor shall appoint the chairperson from among the members of the commission.

(c) The members of the commission shall serve without pay but shall be reimbursed for their actual and necessary expenses, including travel expenses, incurred in carrying out their duties.

(d) Any action taken by the commission shall be approved by a simple majority of its members. Four members shall constitute a quorum to do business.

(e) The commission may hire employees necessary to perform its duties, including administrative personnel, as provided in section 26-35.

(f) The commission shall adopt rules in accordance with chapter 91 to guide its conduct and shall maintain a record of its proceedings and actions.

§ -6 Responsibilities and duties of the commission. The commission shall:

(1) Establish criteria, policies, and controls for permissible uses within the island reserve;

(2) Approve all contracts for services and rules pertaining to the island reserve;

(3) Provide advice to the governor, the department, and other departments and agencies on any matter relating to the island reserve;

(4) Provide advice to the office of state planning and the department of the attorney general on any matter relating to the federal conveyance of Kaho`olawe;

(5) Enter into curator or stewardship agreements with appropriate Hawaiian cultural and spiritual community organizations for the perpetuation of native Hawaiian cultural, religious, and subsistence customs, beliefs, and practices for the purposes stated in section -3;

(6) Carry out those powers and duties otherwise conferred upon the board of land and natural resources and the land use commission with regard to land dispositions and land use approvals pertaining to the island reserve. All powers and duties of the board of land and natural resources and the land use commission concerning land dispositions and land use approvals pertaining to the island reserve are transferred to the commission; and

(7) Carry out those powers and duties concerning the island reserve otherwise conferred upon the county of Maui by chapter 205A. The powers and duties of the county of Maui and its agencies concerning coastal zone disposition and approvals pertaining to the island reserve are transferred to the commission.

§ -7 Fishing. Section -3 of this chapter notwithstanding, the commission shall adopt rules pursuant to chapter 91 to permit fishing in the waters around Kaho`olawe that are consistent with the purpose of this chapter and that take into consideration the health and safety of the general public.

§ -8 Penalty. Any person who violates any of the laws or rules applicable to the island reserve shall be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both, for each offense. Each day of each violation shall be deemed a separate offense.

§ -9 Transfer. Upon its return to the State, the resources and waters of Kaho`olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.

All terms, conditions, agreements, and laws affecting the island, including any ongoing obligations relating to the clean-up of the island and its waters, shall remain in effect unless expressly terminated.

§ -10 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application; and to this end the provisions of this chapter are severable."

SECTION 3. The office of state planning and the department of the attorney general, after consulting with the Kaho`olawe island reserve commission, are authorized to initiate the conveyance of Kaho`olawe

to the State; provided that, before the island of Kaho`olawe is conveyed to the State, agreements shall be executed with regard to liability, monetary resources, rehabilitation, and removal of ordnance and other hazardous wastes.

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of $137,500, or so much thereof as may be necessary for fiscal year 1993-1994, to carry out the purposes of this Act.

The sum appropriated shall be expended by the department of land and natural resources.

SECTION 5. This Act shall take effect upon its approval; except that section 4 shall take effect on July 1, 1993.

(Approved June 30, 1993.)

APPENDIX B

Act 354

A Bill for an Act Relating to Hawaiian Sovereignty.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. On January 16, 1893, John L. Stevens, American minister in Hawaii and friend of those supporting the annexation of Hawaii to the United States, ordered the United States marines to invade Honolulu under the pretext of protecting American citizens and their property. Stevens thereafter recognized a new provisional government even before Queen Liliuokalani surrendered. The actions by the annexationists were condemned by President Cleveland's special envoy and the President himself. When President Cleveland refused to submit a treaty of annexation to the Senate, the new provisional government established the Republic of Hawaii which lasted until annexation in 1898: Sixty-one years later, Hawaii became a state.

Until the provisional government was recognized by John L. Stevens, the Kingdom of Hawaii was recognized as an independent nation by the United States, France, and Great Britain. Many native Hawaiians and others view the overthrow of 1893 and subsequent actions by the United States, such as supporting establishment of the provisional government and later the Republic of Hawaii, the designation of the crown and government lands as public lands, annexation, and the ceding of public lands to the federal government without the consent of native Hawaiians, as illegal. Because the actions taken by the United States were viewed as illegal and done without the consent of native Hawaiians, many

native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American people.

The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native community by taking steps to promote the restoration of the rights and dignity of native Hawaiians. The purpose of this Act is to provide funding for resources to educate the general public about Hawaiian sovereignty.

SECTION 2. There is appropriated out of the general revenues of the State of Hawaii the sum of $300,000, or so much thereof as may be necessary for fiscal year 1993-1994, for the development of programs and curriculum to educate the general public about Hawaiian sovereignty; provided that these education programs and curriculum are developed through a purchase of service contract with Hui Na`auao.

SECTION 3. The sum appropriated shall be expended by the office of Hawaiian affairs for the purposes of this Act.

SECTION 4. This Act shall take effect on July 1, 1993.

(Approved July 1, 1993.)

APPENDIX C

ACT 359

A Bill for an Act Relating to Hawaiian Sovereignty.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION I. Findings. The legislature finds that:

(1) Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a nation prior to the arrival of the first non-indigenous people in 1778;

(2) At the time of the arrival of the first non-indigenous people in 1778, the native Hawaiian people lived in a highly-organized, self-sufficient, subsistence society based on a communal land tenure system with a sophisticated language, culture, and religion;

(3) A unified monarchical government of the Hawaiian Islands was established in 1810, under Kamehameha I, the first King of Hawai`i;

(4) Throughout the 19th century and until 1893, the United States:

(A) Recognized the independence of the Hawaiian Nation;

(B) Extended full and complete diplomatic recognition to the Hawaiian government; and

(C) Entered into treaties with the Hawaiian government to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

(5) In 1893, the United States Minister to the sovereign and independent Kingdom of Hawaii, John L. Stevens, conspired with a small group of non-Hawaiian residents of the Kingdom (including citizens of the United States) to overthrow the indigenous and lawful government of Hawaii;

(6) In pursuit of that conspiracy, the United States Minister and the naval representative of the United States caused armed forces of the United States to invade the sovereign Hawaiian Nation in support of the overthrow of the indigenous and lawful government, and the United States Minister thereupon extended diplomatic recognition to a provisional government formed by the conspirators without the consent of the native Hawaiian people or the lawful Government of Hawaii in violation of treaties between the two nations and of international law;

(7) On December 18, 1893, in a message to Congress, President Grover Cleveland reported fully and accurately on these illegal actions, and acknowledged that by these acts—described by the President as acts of war—the government of a peaceful and friendly people was overthrown and that a "substantial wrong has thus been done which a due regard for our national character was well as the rights of the

injured people requires that we endeavor to repair";

(8) Queen Lili`uokalani, the lawful monarch of Hawaii, and the Hawaiian Patriotic League, representing the aboriginal citizens of Hawaii, promptly petitioned the United States for redress of these wrongs and for restoration of the indigenous government of the Hawaiian Nation; however, this petition was not acted on; and

(9) In 1898, Hawaii was annexed to the United States through the Newlands Resolution without the consent of or compensation to the indigenous people of Hawaii or their sovereign government. As a result, the indigenous people of Hawaii were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands, and their ocean resources.

SECTION 2. Purpose. The purpose of this Act is to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing. In the spirit of self-determination and by this Act, the Legislature seeks counsel from the native Hawaiian people on the process of:

(1) Holding a referendum to determine the will of the native Hawaiian people to call a democratically convened convention for the purpose of achieving consensus on an organic document that will propose the

means for native Hawaiians to operate under a government of their own choosing;

(2) Providing for a mechanism to democratically convene a Hawaiian convention so that native Hawaiians may openly and freely discuss and decide the form and structure of that government; and

(3) Describing the process for the conduct of fair, impartial, and valid elections including a referendum election.

SECTION 3. Definitions. As used in this chapter, unless the context otherwise requires:

"Commission" means the Hawaiian sovereignty advisory commission.

"Hawaiian" and "native Hawaiian" mean any descendent of the races inhabiting the Hawaiian islands prior to 1778.

"Hawaiian organization" means any organization in the State which serves and represents the interests of Hawaiians, has a membership consisting of at least a majority of Hawaiians, and has been organized for at least one year.

"Qualified voter" means any person qualified to vote pursuant to section 13D-3, Hawaii Revised Statutes.

"Special elections" means the Hawaiian convention referendum, the election of delegates, and the ratification election.

SECTION 4. Hawaiian sovereignty advisory commission. (a) There is established within the office of state planning for administrative purposes the Hawaiian sovereignty advisory commission, to advise

the legislature in carrying out the purposes of this Act. The commission shall consist of nineteen members appointed by the governor without regard for section 78-4, Hawaii Revised Statutes. At least twelve of the nineteen members shall be appointed from nominations submitted by Hawaiian organizations. Among the twelve, the governor shall appoint one member so designated from each of the following organizations: the Office of Hawaiian Affairs; Ka Lahui Hawai`i; the State Council of Hawaiian Homestead Association; and the Association of Hawaiian Civic Clubs. The commission shall consist of at least one member from each of the islands, or island groups of: Kauai or Niihau; Maui; Molokai or Lanai; Oahu; and Hawaii. Appointments shall be made before August 1, 1993, and shall not be subject to confirmation by the senate. Any appointment not made by that date shall be filled by the commission during its first meeting which shall be held before August 15, 1993. Any member planning to be a delegate to the Hawaiian convention shall be recused from any decision-making relating to the apportionment of districts and delegates. No member who participated in any decision-making relating to apportionment shall be eligible to serve as a delegate to the Hawaiian convention. The members shall elect a chairperson and vice-chairperson. Any vacancy on the commission shall be filled by the governor within fifteen days after being notified of a vacancy. Members shall serve without compensation but shall be reimbursed for expenses, including travel and subsistence expenses, necessary for the performance of their duties. Expenses shall be paid by the office of state planning.

(b) The commission shall advise the legislature on:

(1) Conducting special elections related to this Act;

(2) Apportioning voting districts;

(3) Establishing the eligibility of convention delegates;

(4) Conducting educational activities for Hawaiian voters, a voter registration drive, and research activities in preparation for the convention;

(5) Establishing the size and composition of the convention delegation; and

(6) Establishing the dates for the special elections.

(c) The commission shall submit a report of findings and recommendations to the legislature not less than twenty days prior to the convening of the regular session of 1994.

SECTION 5. Task forces. (a) The governor shall convene an interagency, task force, consisting of persons from such public agencies as may be necessary, to support the needs of the commission.

(b) The commission may establish a task force, otherwise known as a kupuna council, to provide advice and support as necessary to the commission. Members shall be appointed without regard for section 78-4, Hawaii Revised Statutes. Members of the kupuna council shall serve without compensation but shall be reimbursed for expenses, including travel and subsistence expenses, necessary for the performance of their duties.

SECTION 6. Ballot question. The legislature proposes the following ballot, question:

> "Shall a Hawaiian convention be convened to propose an organic document for the governance of a Hawaiian sovereign nation?"

The commission shall review and may suggest revisions to that question. Upon due consideration, the legislature shall determine the question to be submitted to qualified voters in the 1994 general election.

SECTION 7. Qualifications of voters and elections. The commission shall submit a plan to the 1994 legislature on the qualifications of voters and the conduct of special elections to implement the purposes of this Act, providing that the plan complies with the general election laws of the State.

SECTION 8. Hawaiian convention. The duly elected delegates to the convention shall convene in a manner and at a time recommended by the commission and enacted by the 1994 legislature.

SECTION 9. There are appropriated or authorized from the sources of funding indicated below the following sums, or so much thereof as may be necessary for fiscal year 1993-1994, for the purposes of this Act:

FY 1993-1994	
General Funds	$210,000
Special Funds	$210,000

The special funds authorized by this Act shall be derived solely from the revenues generated under the authority of section 5(f) of the Admission Act.

The sums appropriated or authorized shall be expended by the office of state planning the purposes of this Act.

The office of state planning, may hire staff necessary to accomplish the purposes of this Act, including but not limited to a planning and policy analyst and a program assistant. Such persons shall be exempt from chapter 76 and 77.

SECTION 10. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions of application of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 11. This Act shall take effect on July 1, 1993.

(Approved July 1, 1993.)

APPENDIX D

Act 329

A Bill for an Act Relating to the Public Land Trust.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the events of history relating to Hawaii and Native Hawaiians, including those set forth in Public Law 103-150 (November 23, 1993), continue to contribute today to a deep sense of injustice among many Native Hawaiians and others. The legislature recognizes that the lasting reconciliation so desired by all people of Hawaii is possible only if it fairly acknowledges the past while moving into Hawaii's future.

The legislature further finds that over the last few decades, the people of Hawaii, through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation. Foremost among these achievements have been the creation of the office of Hawaiian affairs and the allocation by legislative action to the office of Hawaiian affairs of substantial funds out of a portion of the public land trust established by section 5(f) of the Admission Act. The overriding purpose of this Act is to continue this momentum, through further executive and legislative action in conjunction with the people of Hawaii, toward a comprehensive, just, and lasting resolution.

The legislature finds, however, that despite its many efforts to provide for and clarify the proper management and disposition of the lands subject to the public land trust and the proceeds and income therefrom, and to effectuate article XII, section 6 of

the Hawaii Constitution, there remains substantial controversy with respect to such matters. Existing and foreseeable areas of controversy include but are not limited to:

(A) Exactly which lands currently comprise the public land trust;

(B) What constitutes a pro rata portion of the trust;

(C) The legislature's intent in defining "revenue" and the "public land trust" for purposes of effectuating article XII, section 6; and

(D) The composition and amount of "revenue", if any, payable to the office of Hawaiian affairs.

These controversies have been reflected in several instances. In one lawsuit, for example, denoted *Office of Hawaiian Affairs v. State of Hawaii*, Circuit Court of the First Circuit, State of Hawaii Civil No. 94-0205-01, the office of Hawaiian affairs claimed entitlement to additional revenues from the public land trust. As more fully discussed in the accompanying conference committee report, which is specifically incorporated into this Act by reference, the court, in pretrial rulings, specifically misinterpreted the scope and applicability of the legislature's statutory definition of "revenue" under section 10-2, Hawaii Revised Statutes, in part by:

(A) Failing to adopt the legislative differentiation between proceeds arising from the actual use of public trust lands and proceeds from the use of nontrust lands or from improvements located on lands;

(B) Failing to adopt the legislative differentiation between improvements constructed with

public trust land proceeds and income and improvements constructed with other moneys;

(C) Failing to give proper effectuation to the legislature's distinction between: (1) "sovereign" functions benefitting not only native Hawaiians, but also the other beneficiary of the public trust, the "general public," such as state affordable housing development and rental projects, and community hospitals and health care systems; and (2) "proprietary" functions; and

(D) Failing to recognize that the list of sovereign functions in the definition of revenue is exemplary rather than exclusive.

The results of these ongoing controversies include but are not limited to:

(A) Presently unasserted and unliquidated claims, or both, against the state for past amounts due which by some estimates could exceed one billion dollars;

(B) As a result of judicial interpretations of chapter 10, Hawaii Revised Statutes, which have created uncertainty as to the application of chapter 10, serious deterioration in the confidence of the bond markets in state government financing inclusive of a downgrading in the state's bond rating with attendant lower bond marketability and the risk of higher interest expenses; and

(C) Substantial difficulty encountered by the executive and legislative branches, particularly in this difficult economic period, in adequately balancing competing claims to scarce state resources and in responsibly planning for future obligations.

It is in the public interest that existing ambiguities be clarified, legislative intent be reiterated, immediate threats to the state's overall financial condition be mitigated, the ability of the state to carry out its sovereign functions be preserved, a responsible and comprehensive state budget process be assured, and a mechanism be established for the resolution of all outstanding issues between the executive and legislative branches and the office of Hawaiian affairs outside of the litigation process and which involves representatives of each.

It is in the public interest that, during the period in which the state and the office of Hawaiian affairs are utilizing in good faith an established mechanism for the non-litigation resolution of outstanding issues and as part of that mechanism:

(A) An inventory of the public trust lands describing those lands with sufficient specificity be undertaken and completed; and

(B) The office of Hawaiian affairs be assured an adequate level of funding with which to accomplish its goals.

It is in the public interest that the relevant issues relating to the global resolution described in the initial paragraphs of this section, including but not limited to issues currently under litigation between the state and the office of Hawaiian affairs, be addressed within and remain under the control of the executive and legislative branches of state government as essentially political questions within the spirit of the Supreme Court of Hawaii's opinion in *Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154 (1987).

The specific purposes of this Act are to address the above findings and implement the above public interests by, among other actions:

(1) Dispelling uncertainty of legislative intent as to revenue from the public land trust by reiterating legislative purpose with respect to:

(A) The definition of "revenue" in section 10-2, Hawaii Revised Statutes, specifically, the differentiation between proceeds, and fees, charges, rents, or other income, derived from proprietary activities occurring on or resulting from the actual use of lands in the public trust and therefore subject to the requirement of section 10-13.5, Hawaii Revised Statutes, and proceeds, and fees, charges, rents, or other income, derived from the exercise of sovereign functions and powers on those lands and therefore excluded from that requirement;

(B) The distinction between proceeds, and fees, charges, rents, or other income, derived from activities actually located on public land trust lands, and proceeds, and fees, charges, rents, or other income, derived from activities actually located on non-public land trust lands;

(C) The fact that the list of sovereign function exclusions at the end of the definition of revenue in section 10-2, Hawaii Revised Statutes, is nonexclusive; and

(D) Other issues currently under dispute in *Office of Hawaiian Affairs v. State of Hawaii*, Circuit Court of the First Circuit, State of Hawaii, Civil No. 940205-01;

(2) Establishing a process to gather information, facilitate discussion, and secure recommenda-

tions to more clearly address within the executive and legislative branches specific issues as to which clarification of legislative intent may be beneficial as well as broader issues relating to the public land trust;

(3) Providing interim measures to ensure that adequate income and proceeds from a pro rata portion of the public trust continue to be available to the office of Hawaiian affairs for the betterment of native Hawaiians while the contemplated process to address issues relating to the public trust is underway;

(4) Facilitating the identification of the public trust lands by requiring that a comprehensive inventory and mapping of such lands be completed, maintained, and used to guide implementation of the public trust requirements and a global resolution of all related issues; and

(5) Taking such other actions as are necessary to effectuate fully the legislature's intent.

SECTION 2. Chapter 10, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§ 10—Interim revenue. Notwithstanding the definition of revenue contained in this chapter and the provisions of section 10-13.5, and notwithstanding any claimed invalidity of Act 304, Session Laws of Hawaii 1990, the income and proceeds from the pro rata portion of the public land trust under article XII, section 6 of the state constitution for expenditure by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians for each of fiscal

year 1997-1998 and fiscal year 1998-1999 shall be $15,100,000."

SECTION 3. (a) There is established a joint committee to study and make recommendations on all outstanding and anticipated issues identified by the joint committee as currently or potentially relating to the public land trust, including whether lands should be transferred to the office of Hawaiian affairs in partial or full satisfaction of any past or future obligations under article XII, section 6 of the Hawaii Constitution.

(b) The joint committee shall consist of eight members, of which the senate president, the speaker of the house of representatives, the office of Hawaiian affairs, and the governor shall each appoint two members. All members of the committee shall be appointed by no later than thirty days after the effective date of this Act, and the joint committee shall convene its initial meeting within thirty days after appointment of the last member. The committee shall conduct public hearings throughout the State to facilitate discussions and formulate recommendations on issues within the joint committee's purview. The committee shall be subject to the requirements of part I of chapter 92, Hawaii Revised Statutes, only when such public hearings are being scheduled or conducted.

(c) The joint committee shall:

(1) Submit a progress report to the legislature no later than twenty days prior to the convening of the regular session of 1998;

(2) Submit a final report to the legislature no later than twenty days prior to the convening of the regular session of 1999; and

(3) Cease to exist on June 30, 1999.

SECTION 4. (a) By December 31, 1998, the department of land and natural resources, with the cooperation as requested by the department of land and natural resources of the office of Hawaiian affairs and any other state department and agency that uses or manages public lands, shall complete a comprehensive inventory and map database of all lands currently subject to section 5(f) of the Admission Act. The inventory shall include but not be limited to:

(1) Identification of fast land parcels by tax map key number;

(2) Identification of submerged lands;

(3) Identification of the agency that has legal jurisdiction of each parcel;

(4) Land use and zoning designations;

(5) Program uses;

(6) Terms of any leases or other dispositions; and

(7) Revenues generated by amount, category, and source.

(b) In undertaking the inventory and mapping provided in subsection (a), the department of land and natural resources shall coordinate with the joint committee referenced in section 3 and, to the extent feasible, shall comply with the joint committee's requests.

(c) In complying with the requirements of this section, the department shall be exempt from the provisions of chapters 76, 77, and 103D, Hawaii Revised Statutes.

(d) The department of land and natural resources shall submit:

(1) A progress report to the legislature no later than twenty days prior to the convening of the regular session of 1998; and

(2) A final report to the legislature with copies of the inventory and maps by December 31, 1998.

SECTION 5. There is appropriated out of the general revenues of the State of Hawaii the sum of $500,000 or so much thereof as may be necessary for fiscal year 1997-1998 and the sum of $500,000 or so much thereof as may be necessary for fiscal year 1998-1999 to carry out the following purposes:

(1) The sum of $75,000 in each fiscal year shall be used for the operating purposes of the joint committee as specified in section 3; and

(2) The sum of $425,000 in each fiscal year shall be used to conduct the public lands inventory as specified in section 4;

provided that no funds shall be released unless funds are matched dollar-for-dollar by the office of Hawaiian affairs to conduct the inventory as specified in section 4; provided further that to the extent any lands subject to inventory and mapping under section 4 are under the control of the department of Hawaiian home lands, the department of Hawaiian home lands shall provide out of the Hawaiian home administration account, up to but not exceeding the amounts appropriated under section 6, a pro rata portion of the total amounts required to accomplish the purposes of section 4. The sums appropriated shall be expended by the department of land and natural resources for the purposes of this Act.

SECTION 6. There is appropriated out of the Hawaiian home administration account the sum of $100,000 or so much thereof as may be necessary for fiscal year 1997-1998 and the sum of $100,000 or so much thereof as may be necessary for fiscal year 1998-1999 to enable the department of Hawaiian home lands to provide its pro rata portion of the total amounts required, if any, to accomplish the purposes of section 4. The sums appropriated shall be expended by the department of Hawaiian home lands for the purposes of this Act.

SECTION 7. There is appropriated out of the general revenues of the State of Hawaii the sum of $15,100,000 or so much thereof as may be necessary for fiscal year 1997-1998 and $15,100,000 or so much thereof as may be necessary for fiscal year 1998-1999 to be transferred to and expended by the office of Hawaiian affairs for the purposes of section 2 of this Act.

SECTION 8. This Act's expression of the purpose, objective, and intent of the legislature in enacting section 3 of Act 304, Session Laws of Hawaii 1990, shall guide the proper interpretation of section 3 of Act 304 as originally enacted.

SECTION 9. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 10. This Act shall take effect upon its approval; provided that sections 5, 6, and 7 shall take effect on July 1, 1997.

Approved June 30, 1997.

APPENDIX E

IN THE CIRCUIT COURT OF THE
FIRST CIRCUIT STATE OF HAWAII

[Filed June 4, 2008]

Civil No. 94-4207-11
(Declaratory Judgment)

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Plaintiffs,

v.

HOUSING & COMMUNITY DEVELOPMENT
CORPORATION OF HAWAII, *et al.*,
Defendants.

ORDER GRANTING PLAINTIFFS' REQUEST
FOR AN INJUNCTION

On January 31, 2008, the Supreme Court of the State of Hawaii issued an opinion vacating the trial court's January 31, 2003 judgment and remanding this case to the Circuit Court with instructions to issue an order granting the Plaintiffs' request for an injunction against the Defendants from selling or otherwise transferring to third parties (1) the Leiali`i parcel and (2) any other ceded lands from the public lands trust until the unrelinquished claims of the native Hawaiians to the ceded lands have been resolved, and

On March 24, 2008, the Supreme Court of the State of Hawai`i filed the Judgment On Appeal and pursuant to the opinion of the Supreme Court of the State of Hawai`i entered on January 31, 2008, the

judgment of the Circuit Court of the First Circuit, filed January 31, 2003, was vacated and this case was remanded to the Circuit Court with instructions to issue an order granting the plaintiffs-appellants' request for an injunction against the defendants-appellees from selling or otherwise transferring to third parties (1) the Leiali`i parcel and (2) any other ceded lands from the public lands trust until the unrelinquished claims of the native Hawaiians to the ceded lands have been resolved,

The Court having reviewed all the pleadings, memoranda, testimony, exhibits, and opinion of the Hawai`i Supreme Court, *OHA v. HCDCH*, 117 Hawai`i 174, 177 P.3d 884 (2008), makes the following order:

Plaintiffs requested an injunction that permanently enjoined Defendants, and their agents, officers, employees and any persons acting in concert or participation with them, from selling, transferring or alienating ceded lands, including the ceded lands that comprise the Leiali`i projects, to third parties, until the unrelinquished claims of native Hawaiians to the ceded lands are resolved, except that Plaintiffs did not object to the State of Hawai`i continuing its practice of transferring remnants, and issuing licenses, permits, easements and leases concerning ceded lands;

Now therefore it is ordered and decreed that: (1) the Circuit Court's Opinion entered on December 5, 2002 is hereby vacated, and (2) Defendants and their agents, officers, employees, and any persons acting in concert or participation with them, are hereby restrained and enjoined from directly or indirectly selling or otherwise transferring to third parties until the unreliquished claims of the native Hawaiians are resolved (a) the Leiali`i parcel and (b) any other ceded lands from the public lands trust, except that the State of Hawai`i,

and its departments, agencies, agents, officers, and employees may continue its practice of transferring remnants, and issuing licenses, permits, easements and leases concerning ceded lands.

Dated: Honolulu, Hawaii, June 3, 2008

/s/ Sabrina S. McKenna
THE HONORABLE SABRINA S. MCKENNA
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ Mark J. Bennett
MARK J. BENNETT, ESQ.
Attorney General
State of Hawaii

REPLY BRIEF

98

(6)

FILED
JUL 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1372

IN THE

Supreme Court of the United States

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

No. 07-1372

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

REPLY BRIEF FOR PETITIONERS

Respondents do not even dispute that the Hawaii Supreme Court was *wrong on the merits* in construing the federal Apology Resolution to strip the State of essential attributes of sovereignty over almost all state-owned lands. Respondents offer no defense of that construction because it is indefensible. Respondents instead suggest, in effect, that precisely *because* the Apology Resolution cannot support the result below, the state court must have relied on state law instead. But the court's interpretation of the Apology Resolution was *both* indefensible *and* the primary basis for its judgment. The result is an unprecedented affront to state sovereignty, committed in the name of federal law, and only this Court can undo the damage.

I. THIS COURT HAS JURISDICTION

A. The Decision Below Easily Satisfies The *Michigan* v. *Long* Presumption

This Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983). This is a classic case of that type.

Respondents claim (Opp. 11) that the decision below was primarily based not on the Apology Resolution, but on preexisting state trust law and four state enactments—none of which even purports to curb the State's authority to dispose of the ceded lands.[1] That argument is baseless. At three separate points in its opinion, the Hawaii Supreme Court emphasized that "it was not until the [federal] Apology Resolution was signed into law on November 23, 1993 that the plain-

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[1] The only state statute cited by respondents that even arguably requires the State to hold lands for a future "native Hawaiian entity," 1993 Haw. Sess. L. Act 340, is limited to land on a former military target range on Kaho'olawe island. Pet. App. 38a-39a. That land, which the United States conveyed 35 years after the Admission Act, constitutes only 2% of the land owned by the State, whereas the lands at issue in this case constitute nearly *all* State-owned lands. *See* Pet. 3 n.1. The other cited state statutes relate to this case only in the exceedingly attenuated sense that they criticize the overthrow of the Hawaiian monarchy, voice general support for native Hawaiians, and recite the undisputed fact that "[m]any native Hawaiians *believe*" that they have a legal claim either to the ceded lands or to "monetary reparations." Pet. 35a-38a (quoting 1993 Haw. Sess. L. Act 354, § 1 (some emphasis omitted)).

tiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was *not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis.*" Pet. App. 62a-63a (emphasis added); *accord id.* at 58a-59a, 99a.

This thrice-repeated holding alone forecloses respondents' jurisdictional claim. As respondents observe, the Apology Resolution "was enacted *after* three of the four Hawaii laws at issue in the case" (Opp. 2 (emphasis added)) and after the development of common-law trust principles. Obviously, if the Hawaii Supreme Court had deemed these state-law grounds independent of the Apology Resolution and adequate to support the judgment, it would not have concluded that respondents' trust-law theory did not even "ar[i]se" until the later-enacted Apology Resolution was signed.[2]

These passages likewise refute respondents' perplexing suggestion that "[h]ad there never been a federal Apology Resolution, the Hawaii court could and would have reached the very same result and imposed the same remedy." Opp. 10. That is the opposite of what the court actually said. Perhaps respondents mean only that the Hawaii Supreme Court was so re-

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[2] The one state statute enacted after the Apology Resolution, Act 329, did not purport to limit the State's disposition of the ceded lands; it merely sought to clarify OHA's share of ceded-land revenues and endorsed continued "momentum" toward reconciliation with Native Hawaiians. 1997 Haw. Sess. L. Act 329, § 1. The Hawaii Supreme Court did not suggest that Act 329 had any special significance among the other state-law provisions. Instead, it repeatedly lumped them all together in the phrase "the Apology Resolution and ... *related state legislation.*" *E.g.*, Pet. App. 41a (emphasis added).

sult-oriented that, as a matter of *Realpolitik*, it would have found some state-law basis for reaching the same conclusion if the Apology Resolution had never been enacted. But that is not the standard. This Court presumes the good faith of state courts, and "[i]f the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 467 U.S. 150, 152 (1984).

If further proof were needed that the judgment below rested primarily on the Apology Resolution, the Hawaii Supreme Court amply supplied it. The court began by observing that "[a]t the *heart of plaintiffs' claims* ... is the Apology Resolution," that "plaintiffs' current claim for injunctive relief is ... *based largely upon the Apology Resolution*," and that this claim presupposes that the Resolution "*changed the legal landscape* and restructured the rights and obligations of the State." Pet. App. 26a-27a (emphasis added; internal quotation marks omitted). Then, in holding for respondents, the court agreed that "[t]he *primary question* before this court on appeal is whether, *in light of the Apology Resolution*, this court should issue an injunction" against sale of the trust lands, and it concluded that "*the Apology Resolution dictates* that the ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people." Pet. App. 79a, 85a (emphasis added, alteration in original omitted).

Although the court invoked several provisions of state law as secondary bases for its decision, it did not begin to "indicate[] clearly and expressly" that its

judgment was "alternatively based on bona fide separate, adequate and independent [state] grounds." *Long*, 463 U.S. at 1041. Indeed, any such statement would have contradicted the court's own repeated holding that "it was not until the [federal] Apology Resolution was signed into law" that the respondents' claim even arose. Pet. App. 62a-63a; *accord id.* at 58a-59a, 99a.

The two isolated passages on which respondents rely do not support their contrary position. First, respondents erroneously claim (Opp. 14) that the Hawaii Supreme Court was comparing the state statutes *to the Apology Resolution* when it stated: "More importantly, the state legislature itself has announced that future reconciliation between the State and native Hawaiians will occur." Pet. App. 86a. To the contrary, the court was stating that this general legislative aspiration to "future reconciliation" was legally "[m]ore important" than similar aspirations voiced in a report by the Justice and Interior Departments, *not* more important than the Apology Resolution. *See* Pet. App. 85a-86a. The court removed any doubt about the overriding importance of the Apology Resolution itself by stating, in the same section of its opinion, that "a plain reading of the Apology Resolution ... dictates" the answer to the actual legal question presented in this case: whether the State may *sell its lands*. Pet. App. 85a (internal citation omitted).

Respondents also attribute misplaced significance to the court's statement that "we need look no further than the legislative pronouncement contained in Act 329, declaring that a 'lasting reconciliation [is] desired by all people of Hawai'i,' to conclude that the public interest supports granting an injunction." Pet. App. 94a (internal citation omitted). But here respondents are

simply quoting from an inapposite section of the opinion. When considering injunctive relief, the Hawaii Supreme Court—like other courts—looks not only to the legal merits, but also to equitable factors such as the "public interest." The passage respondents quote appears in the court's weighing of equitable considerations, which it addressed only after concluding that, in light of the Apology Resolution, respondents "have prevailed on the merits." Pet. App. 84a-85a. This petition, of course, challenges that underlying merits determination.

B. This Court Would Have Jurisdiction Even If The Decision Below Did Rest Alternatively On Adequate State-Law Grounds

This Court would have jurisdiction here even if the decision below *did* rest on adequate and independent state-law grounds, because the Court's resolution of the federal-law issue would still affect these parties' interests in this ongoing dispute. That conclusion follows from close examination of the underlying source of the "adequate and independent state law ground" doctrine: the case-or-controversy requirement of Article III.

This Court lacks jurisdiction to issue "advisory opinions" that might resolve some abstract point of law but could have no practical impact on the parties, because the parties would then lack the requisite adversity in the outcome, and the case would not present a genuine case or controversy. *See Florida* v. *Meyers*, 466 U.S. 380, 381-382 n.* (1984) (final paragraph). In contrast, if the parties *do* have mutually antagonistic interests in this Court's resolution of a federal-law issue, there can be no case-or-controversy objection to this Court's jurisdiction. *See id.*

In the *typical* case presenting *Michigan* v. *Long* issues, the presence of adequate and independent state-law grounds would keep any resolution of the federal issue from having any practical impact on the parties—and would thereby deprive this Court of jurisdiction. *Long* itself illustrates the concern. There the state court had identified two potential sources of constitutional law—one state, one federal—for vacating a criminal defendant's conviction. *See* 463 U.S. at 1037 & n.3. If the state-law ground had been an adequate and independent basis for that outcome, this Court's reversal on the federal-law ground (in favor of the prosecution) would have made no practical difference to the parties, because the defendant's conviction still would have been vacated.

This case differs from the norm in that *these* parties have antagonistic interests in the resolution of the federal-law issue quite apart from how any state-law issues are resolved. So long as the federal-law holding below remains intact, it will obstruct state-level efforts to restore the State's land-transfer authority, because native Hawaiian interests can claim that this holding trumps any state-law initiatives. *See* Pet. 16-17. Petitioners thus have a concrete interest in securing removal of this federal-law obstacle to state-level political checks. *See* Pet. 16-17. Respondents, in contrast, have a strong competing interest in *sustaining* the Hawaii Supreme Court's conclusion that "the [federal] Apology Resolution ... dictates" the result below (Pet. App. 85a), no matter how state law is amended.

That adversity of interest would support this Court's jurisdiction even if the decision below *had* "indicate[d] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Long*, 463 U.S. at 1041; *see Meyers*, 466 U.S.

at 381-382 n.* ("even if [there was] an independent state ground for reversal [of a conviction], we would still be empowered to review" the federal issue because "there is no possibility that our opinion will be merely advisory," given its potential to affect subsequent proceedings). Respondents offer two objections to this point, neither of which has merit. First, they claim that this jurisdictional rationale "would spell the end of the adequate and independent state grounds doctrine" because, they say, resolution of disputes about federal law could always trigger future state-level changes to parallel issues of state law. Opp. 17. That argument misses the mark. Again, in the typical *Long*-type case, this Court's decision could not affect the interests of the parties at bar and could at most trigger state-law changes affecting only hypothetical *future* parties in hypothetical *future* disputes. But this case presents no such danger because this Court's disposition of the federal issue would concretely affect the interests of *these* parties to *this* dispute.

Respondents also object that it may be difficult to "estimate what effect, if any, [a] decision has on state politics," and "the anticipated state political movement may never even materialize." Opp. 17. But that cannot plausibly be a concern here. The remedy ordered below is an injunction against the sale of the ceded lands while "the issue of native Hawaiian title to the ceded lands [is] addressed *through the political process*." Pet. App. 87a-88a (emphasis added). And the whole point of that remedy is to *alter* that political process by (supposedly) "leveling the playing field during the pendency of settlement negotiations and [the] reconciliation process." *Id.* at 95a. It is nonsensical to argue that *reversing* this intentional alteration of the state political process would have no *effect* on the state political process.

II. CERTIORARI IS WARRANTED TO PRECLUDE MISUSE OF FEDERAL LAW TO SUBVERT STATE SOVEREIGNTY

For decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its "public trust" obligations, which run to *all* the citizens of Hawaii, not (as respondents suggest) just to native Hawaiians. *See* Pet. 4, 12-13; Pet. App. 116a-117a. Both the federal Admission Act and state law contemplate that, as is common in such arrangements, the State will discharge its trust obligations by selling some of the ceded lands and using the proceeds to benefit its citizens.[3] For example, both the Act and the state constitution direct the State to use these lands to promote private "farm and home *ownership* on as widespread a basis as possible." Pet. App. 116a (Admission Act; emphasis added); *accord* Haw. Const. art. XI, § 10 (same language); *see Big Island Small Ranchers Ass'n* v. *State*, 588 P.2d 430, 435 (Haw. 1978) (this language "refers expressly to farm and home ownership and not leaseholds"). And both the Admission Act and state law direct the State to use the "proceeds from the *sale*" of the ceded lands to fund any of five broad categories of public programs. Pet. App. 116a (emphasis added); *accord* Haw. Rev. Stat. § 171-18.[4]

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[3] *See generally Alabama* v. *Schmidt*, 232 U.S. 168, 174 (1914) ("[E]ven in honor [the trust] would not be broken by a sale and substitution of a fund ... a course, we believe, that has not been uncommon among the states."); *see, e.g., Lassen* v. *Arizona*, 385 U.S. 458, 466-467 (1967).

[4] Many of those proceeds are used to fund programs for native Hawaiians. *See* Pet. 5. The parties have not addressed, and this case does not present, the constitutional challenges raised by

This dispute arose when the State tried to sell a small parcel to provide affordable housing and thereby promote "home ownership on as widespread a basis as possible." The Hawaii Supreme Court has now prohibited that and all similar initiatives by, in effect, allowing native Hawaiian interests to veto any sale of state lands until the court has satisfied itself that the State has reached some yet-undefined "political resolution" with native Hawaiians. That would be bad enough if the court had relied primarily on state law, but instead it relied on a federal-law determination beyond the state government's power to correct.

Only this Court can undo that affront to the State's sovereignty interests. Respondents untenably claim (Opp. 9) that this petition "invit[es] this Court to meddle in what are quintessentially state-level affairs." The truth is the opposite. This petition asks the Court to empower the state-level political process to operate precisely as it should, "disabused of [a state court's] erroneous view of what [federal law] requires." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995); *see also* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1510 (1987) (where "a state court [has] intentionally muddled the state and federal questions in order to prevent [the] state's democratic branches from recognizing their power to alter the result," Supreme Court "[d]eference to the state court on that basis parodies true deference to the state").

Even though the affected lands constitute nearly *all* lands owned by the State, respondents further dis-

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amicus Pacific Legal Foundation to governmental programs directed to native Hawaiians.

parage as "limited" the State's interest in selling any of them to promote affordable housing and for other purposes. Opp. 24 (capitalization altered). This is as wrong as it is patronizing. Although, as respondents note (*id.*), the State has refrained from selling many of these lands since respondents filed suit, that is hardly surprising, given that OHA's very claim here is that the State *cannot pass good title to buyers*. Now that the state courts have concluded nearly fourteen years of dilatory litigation on that issue, further delay would thwart not just the programs the State can implement only by selling some of its lands, but the dignitary interests at the heart of state sovereignty.

Finally, there is no merit to respondents' claim that, by reversing, this Court would engage in "mere error-correction of a factbound Hawaii issue." Opp. 19. The lands at issue constitute 1.2 million acres—nearly 30% of Hawaii's total land area. *See* Pet. 3 n.1. The "error" at issue affects all citizens of Hawaii. And that error has not only violated this State's sovereignty, but alarmed many other States as well, which is why 29 States have filed an amicus brief in support of certiorari. These States understand that, following the Hawaii Supreme Court's example, any state judiciary may impair state sovereignty interests not by construing state law, but by making "federal law determination[s] that could not be overturned by [the State's] legislature or electorate" and are thus "virtually beyond the reach of democratic politics." Ruth Bader Ginsburg, *Book Review*, 92 Harv. L. Rev. 340, 343-344 (1978) (reviewing Tribe, *American Constitutional Law* (1978)) (internal quotation marks omitted). This Court should grant cer-

tiorari to reaffirm that state courts may not misuse federal law in that manner.[5]

CONCLUSION

The petition should be granted.

Respectfully submitted.

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[5] Although respondents claim that federal legislation proposed in 2001 might someday affect "[f]ederal law toward native Hawaiians" (Opp. 27 n.11), they identify no reason to think that the legislation, if passed, could somehow affect *this case*.

AMICUS CURIAE BRIEF

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(4)

No. 07-1372

FILED

JUN 2 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF OF *AMICUS CURIAE* COMMISSIONER OF PUBLIC LANDS FOR THE STATE OF NEW MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Patrick H. Lyons, in his capacity as the Commissioner of Public Lands for the State of New Mexico (hereinafter, the "Commissioner") files this brief in support of the Petition for a Writ of Certiorari. The Commissioner serves as the State's constitutional trust officer charged to direct, control, care for and dispose of lands granted in trust by the United States to the State of New Mexico in the New Mexico Enabling Act (Act of Congress dated June 29, 1910, Pub. L. 61-219, Ch. 310, 36 Stat. 557).[2] New Mexico holds in trust approximately 9 million acres of surface estate and approximately 13 million acres of mineral estate statewide. As set forth in the Enabling Act, these lands were granted by the federal government to the State in trust to support public schools, public institutions of higher learning and various other public institutions. A significant portion of state trust

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[1] This brief was not authored, in whole or in part, by counsel for any party, and no person or entity other than amicus and its counsel contributed monetarily to the preparation or submission of the brief. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief.

[2] The State of New Mexico, through its Attorney General, has joined with various other states in filing an amicus brief. The Commissioner is writing separately to provide an additional perspective from the point of view of a trust officer entrusted specifically with the responsibility to carry out the State's obligations under the New Mexico Enabling Act.

income is achieved through land sales and exchanges. Because of the importance of these resources in supporting vital public institutions throughout the State, the Commissioner has a strong interest in any decision that suggests that the State's ability to alienate trust lands for the benefit of the trust and its beneficiaries can be substantially restricted by Congressional action such as the Joint Resolution at issue in this case.

The Court previously has addressed issues pertaining to the New Mexico Enabling Act and the contemporaneously adopted Arizona Enabling Act. *See Ervien v. United States*, 251 U.S. 41 (1919); *Lassen v. Arizona ex rel. Arizona Hwy. Dep't*, 385 U.S. 458 (1967). Because the express trust created under the Hawaii Admission Act was based on principles established in the New Mexico and Arizona Enabling Acts, the Commissioner is well situated to provide background and analysis regarding the federal law issues raised by the Hawaii Supreme Court's unprecedented injunction barring state alienation of lands held in a similar federal law trust.

SUMMARY OF ARGUMENT

The decision of the Hawaii Supreme Court imposes an unprecedented restriction on the alienation of lands granted by the federal government to provide support for schools and other public benefits. The Court found authority for that restriction in the Apology Resolution (The Joint Resolution to Acknowledge

the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993)), passed by Congress 34 years after the federal government granted the lands to the state in trust and established the terms of the trust. In granting federal lands to the State of Hawaii in trust upon its admission into the Union, Congress followed a practice that had evolved from the earliest days of the Union to allow new states to be admitted on an equal footing with existing states. Under this well-established practice, the lands were granted to newly admitted states pursuant to a solemn compact under which the states agreed not to tax federal lands in the state and, in exchange, acquired lands which could be used to support vital public institutions. Because the granted lands ceased to be federal property and no federal power was reserved to substantially restrict the states' ability to alienate granted lands for the benefit of the trust and its beneficiaries, subsequent Congressional action such as the Apology Resolution cannot have the effect that the Hawaii Supreme Court gave it.

Although Congress clearly could have retained the power to restrict alienation of the granted land, it did not do so; the only federal authority reserved was enforcement of the terms of the trust as set forth in the Admission Act. If the federal government could alter its grant in the manner determined by the Hawaii court, fundamental principles of federalism would be violated. And, fundamental trust principles would be altered if the federal government, as settlor,

could establish a trust, make an irrevocable grant to the trust, and then seek to take back all or a part of the trust corpus. Only if the Hawaii Supreme Court had first determined that the trustee's discretion regarding disposition of trust assets was arbitrary and capricious, and thus a violation of the terms of the trust, could it have enjoined the trust as it did. No such determination was made by the Court. For these reasons this Court should grant the Petition of the State of Hawaii.

ARGUMENT

I. THE APOLOGY RESOLUTION COULD NOT RESTRICT ALIENATION OF HAWAII'S TRUST LANDS BECAUSE CONGRESS HAS NO PROPERTY CLAUSE POWER TO IMPOSE RESTRICTIONS BEYOND THOSE CONTAINED IN THE ADMISSION ACT

The Hawaii Supreme Court's decision assumes that Congress has authority to restrict the State of Hawaii's alienation of lands granted to Hawaii in trust at statehood. However, for Congress to do so would be contrary to the terms of the Admission Act trust. Because the granted lands are no longer federal property subject to Congressional regulation under the Property Clause of U.S. Const., art. VI, § 3, and Congress has no other authority under which it can restrict alienation of the granted lands, the Court's assumption is incorrect as a matter of federal law.

This Court has not previously addressed the authority of Congress to modify the terms of a land grant trust to further restrict alienation of granted lands. Because this federal law issue is important to many of the land-grant states, this Court should review the decision of the Hawaii Supreme Court to settle that issue.

The history surrounding federal land grants to states reaches back to the Land Ordinance of 1785[3] and the Northwest Ordinance of 1787.[4] *See Andrus v. Utah*, 446 U.S. 500, 522-25 (1980) (Powell, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 268-70 (1986). When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. However, when settlers sought to carve the State of Ohio from the Northwest Territory in 1802, the federal government owned much of the land within the boundaries of the proposed State, which land was immune from taxation. In order to place

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[3] The Land Ordinance of 1785 "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township. . . . " 1 Laws of the United States 565 (1815).

[4] Article III of the Northwest Ordinance of 1787 declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52. Article IV provided that legislatures established in the region could not "tax . . . the property of the United States" or interfere with the Federal Government's disposal of the public lands. *Id.*

Ohio on an equal footing with the original States, Congress enacted a compromise, which set a pattern followed in the admission of virtually every other State. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. *See generally* Paul Wallace Gates, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968). Over time, the grants included additional lands to support other public institutions. These agreements were solemn bilateral compacts between each State and the Federal Government. *Andrus*, 446 U.S. at 523.

Although the initial grants to states did not specifically proscribe the disposition of the lands, the need for clear Congressional authorization to sell, in order to raise adequate funds, resulted in special legislation that granted this authority to new states. Thereafter, Congress began to specifically restrict the manner of sales in order to assure that a fair price be obtained. There is thus no question that Congress' purpose in supporting education has consistently been expressed as the intention that the lands be alienable (sold) as a means of providing the necessary funds. *See* Jon A. Souder & Sally Fairfax, STATE TRUST LANDS (1996) at 30-31.

In the Hawaii Admission Act of March 18, 1959, Pub.L. No. 86-3, 73 Stat. 4, admitting Hawaii as a state, the United States granted to the State of Hawaii, with certain specified exceptions, "title to all the public lands and other property . . . within the

boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union." *Id.* at § 5(b). Section 5(b) states that this grant "shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii." *Id.* Section 5(f) provides that the granted lands, together with the proceeds from the sale or disposition of any such lands and the income therefrom, "shall be held by said State as a public trust" for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Section 5(f) further provides that use of the lands and proceeds "for any other object shall constitute a breach of trust for which suit may be brought by the United States[.]"

In imposing a federally-enforceable trust on the granted lands and the proceeds and income derived from the lands, Congress followed a practice that had developed over time to ensure that the grants were properly administered. *See Lassen*, 385 U.S. at 460-61; *Papasan*, 478 U.S. at 289 n. 18. Authority for the grants and the imposition of the trust comes from the Admissions Clause of U.S. Const., art. IV, § 3 and the Property Clause of U.S. Const., art. VI, § 3. *See generally Branson School Dist. RE-82 v. Romer*, 161

F.3d 619, 635-36 (10th Cir. 1998) (discussing Admissions Clause and Property Clause authority for statehood land grants and trust restrictions). However, while the federal government retained authority to enforce the terms of the trust, where one was imposed, it did not retain a continuing ownership interest in the lands, and thus did not retain continuing Property Clause power to further regulate the disposition of the lands.

Under general trust principles, once a trust is created, the trust terms cannot be altered except by the exercise of a reserved power to do so. *See* 2 RESTATEMENT (THIRD) OF TRUSTS § 63; Bogert, TRUSTS & TRUSTEES, § 42 (2d ed. 1965). This principle applies to charitable trusts. *See* 2 RESTATEMENT (SECOND) OF TRUSTS § 367 at 245 (1959) ("If a charitable trust has been validly created, the settlor cannot revoke or modify it unless he has by the terms of the trust reserved the power to do so."). Here, Congress expressly created a trust when granting the lands to the State of Hawaii, and thus it should be presumed that Congress anticipated the application of general trust principles, including the principle barring modification of the trust except through the exercise of powers reserved at the time that the trust was created. Because Congress did not reserve the power to modify the terms of the trust to further restrict the state's ability to alienate the trust lands, no such authority existed at the time that Congress passed the Apology Resolution.

In *Coyle v. Secretary of State of Oklahoma*, 221 U.S. 559 (1911), the Court held that the Oklahoma

legislature could move the state capital from Guthrie to Oklahoma City, contrary to a provision of the Oklahoma Enabling Act, because such action was within a state's sovereign power after it was admitted to the Union. As the *Coyle* court said, "The [Admissions Clause] power, is to admit 'new States into this Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567. Thus, in the absence of some Constitutional authority delegated to Congress, Congress had no authority to impose further restrictions on the granted lands other than those imposed by the Hawaii Admission Act.

In finding that the Apology Resolution prohibits alienation of the granted lands, the Hawaii Supreme Court assumed that Congress had authority to do so. Because that assumption is not warranted, and because the purported exercise of such power has important implications with respect to state sovereignty and the status of granted lands in other states, the Court should grant the petition for a writ of certiorari to clarify that Congress does not have such power, or at the very least to establish that Congress must provide a clear and unequivocal statement that it is intending to restrict alienation pursuant to a valid exercise of federal authority. *Cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (stating that Congressional abrogation of state sovereign immunity involves an unequivocal Congressional

expression of intent to abrogate pursuant to a valid exercise of the power to abrogate).

II. THE TRUST LANDS WERE GRANTED PURSUANT TO A COMPACT, WHICH CANNOT BE CHANGED UNILATERALLY

As noted above, the federal government made the grants to the states in "a solemn bilateral compact" between the federal government and each of the states with "[t]itle to the sections vested in the State." *See Andrus*, 446 U.S. at 523. And, it is black letter law that a bilateral agreement cannot be changed unilaterally. Thus, even if the federal government had intended with its apology to impact the disposition of grant lands, the terms of the compact would prohibit such action.

Under the terms of the compact, the federal government only has the power to dispose of granted lands and does not have the power to enjoin the state from alienating lands. In *Andrus*, this Court determined that the federal government had the power to dispose of grant lands prior to a survey, and thus prior to title passing to a State. *Andrus*, 446 U.S. 500, 506-07. In so determining, the Court highlighted the principle that once title has passed the grantor no longer has the power to dispose of the land. In this case, the federal government's grant was complete and title passed long before the Apology. At the time of the Apology, the federal government clearly did not have the power to restrict alienation of grant land.

Moreover, under the equal footing doctrine, all states are admitted to the Union with the same attributes of sovereignty as the original 13 States. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). This doctrine prevents the federal government from impairing the fundamental attributes of state sovereignty when it admits new States into the Union. *Id.* Because the compact terms providing for an irrevocable grant of land in trust constitute a fundamental aspect of state sovereignty, the Hawaii Court's injunction violates the equal footing doctrine.

III. THE APOLOGY IS A POLITICAL APOLOGY AND DOES NOT INCLUDE RESTITUTION

The Hawaii Supreme Court was improperly persuaded that language in the Apology Resolution warranted an injunction against the alienation of trust land. This decision can impact federally granted trust lands in over 26 states.

Where Congress intends an apology such as this one to include restitution it clearly states that restitution is intended. *See* Radiation Exposure Compensation Act of 1990, Pub. L. No. 101-426, 104 Stat. 920. In enacting the Radiation Exposure Compensation Act, the federal government apologized to individuals exposed to the Government's atmospheric nuclear tests which exposed individuals to radiation. The law gave restitution for improper acts by the federal government. As in the Hawaii case, Congress made a

formal apology. *Id.* at § 2(c) ("Apology. – The Congress apologizes on behalf of the Nation to the individuals described in subsection (a) and their families for the hardships they have endured."). And Congress also provided specifically for restitution. *Id.* at § 2(b) ("It is the purpose of this Act [this note] to establish a procedure to make partial restitution to the individuals described in subsection (a) for the burdens they have borne for the Nation as a whole."). Congress went on to set forth a plan for restitution.

The Apology Resolution at issue does not provide for restitution. Given its lengthy nature people may wish that restitution was intended. However, even if restitution was intended it could not legally be accomplished by using state trust lands which the federal government has conveyed to the State.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 2, 2008

AMICUS CURIAE BRIEF

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(3)

FILED
JUN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1372

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Hawaii

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Congress by the Admission Act and the Apology Resolution, may, without violating the Fifth Amendment, require or permit the State of Hawaii, Trustee of the Federally-created Ceded Lands Trust, to discriminate between trust beneficiaries on the basis of race?

2. Whether the State of Hawaii, Trustee of the Ceded Lands Trust, may, without violating the Fourteenth Amendment, discriminate between trust beneficiaries on the basis of race?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Most notably, PLF participated as amicus curiae in support of petitioner Harold F. Rice in *Rice v. Cayetano*, 528 U.S. 495 (2000). Both *Rice* and the present case concern Article XII, Section 5, of the Hawaii Constitution, which established the State of Hawaii's Office of Hawaiian Affairs (OHA). In *Rice*, this Court found that the terms "native Hawaiian" and "Hawaiian," as used by OHA, are racial classifications,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

and that a race-based scheme that allowed only statutorily defined "Hawaiians" to vote for trustees of OHA was unconstitutional.

Despite *Rice*, and Justice John Marshall Harlan's admonition one-hundred and twelve years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), OHA and the State of Hawaii continue to treat "native Hawaiians" and "Hawaiians" as different classes among citizens of Hawaii. This practice has spawned numerous lawsuits until finally culminating in the present legal crisis in which the State of Hawaii's sovereign authority to manage its land for the good of all of its citizens, has been replaced with a court-imposed duty to hold the land for the benefit of one racial class. Only this Court can extricate Hawaii from its present legal morass, because the decision of the state court below is based upon its tortured interpretation of a United States Congressional Joint Resolution.

This Court announced in *Rice* the unwavering principle that, "[t]he Constitution of the United States . . . has become the heritage of all the citizens of Hawaii." *Rice*, 528 U.S. at 524. PLF files this brief to urge this Court to grant the petition for writ of certiorari, and ensure that Hawaii, once and for all, is required to abandon its racial classifications and treat its citizens with the equality to which they are entitled under the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The core issue of this case is whether a state court interpreting federal law may enjoin the State of Hawaii from exercising its sovereign authority to sell, lease, or rent the "ceded lands" for the benefit of all citizens of the State of Hawaii, pending some resolution, as yet unknowable, of the claims of native Hawaiians to those lands.

As this Court recognized in *Rice*, 528 U.S. at 505, the Republic of Hawaii ceded all of its former Crown, government, and public lands to the United States upon annexation in 1898. Revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Joint Resolution of Congress (Newlands Resolution), J. Res. No. 55, 55th Cong., 30 Stat. 750 (1898); *Rice*, 528 U.S. at 505.

When Hawaii was admitted as the 50th State of the Union in 1959, the United States granted back to Hawaii title to all public lands and public property within the boundaries of the State—the ceded lands—save those which the Federal Government retained for its own use. Pub. L. No. 86-3, §§ 5(b)-(d), 73 Stat. 5 (1959) (Admission Act); *Rice*, 528 U.S. at 507. The lands, and the proceeds and income generated by the ceded lands,

> were to be held "as a public trust" to be "managed and disposed of for one or more of" five purposes: (1) for the support of the public schools and other public educational institutions, (2) for the betterment of the conditions of native Hawaiians, as defined in

> the Hawaiian Homes Commission Act[2], . . . (3) for the development of farm and home ownership on as widespread a basis as possible, (4) for the making of public improvements, and (5) for the provision of lands for public use.

Admission Act § 5(f), 73 Stat. 6; *Rice*, 528 U.S. at 507-08.

In 1978, Hawaii amended its Constitution to establish a new state agency, Respondent, Office of Hawaiian Affairs, Haw. Const. art. XII, § 5. OHA's race-conscious mission is "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians," Haw. Rev. Stat. Ann. § 10-3 (1993). State law gives OHA broad authority to administer two categories of funds: a 20% share of the revenue from the ceded lands, which OHA is to administer for the betterment of the conditions of native Hawaiians, Haw. Rev. Stat. Ann. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const. art. XII, § 6. *See generally* Haw. Rev. Stat. Ann. §§ 10-1 to 10-16. The terms

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[2] The Hawaiian Homes Commission Act was created by Congress to set aside over 200,000 acres of ceded lands for exclusive homesteading by native Hawaiians. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). As a condition of statehood, the United States required Hawaii to adopt the act as a provision of the state constitution, *see* Haw. Const. art. XI, § 2 (1959) (renumbered art. XII, § 2 (1978)). The Hawaiian Homes Commission Act defines the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," HRS, vol. 1 at § 201(7) of the Hawaiian Homes Commission Act. Pub. L. No. 67-34, 42 Stat. 108 (1921).

"native Hawaiians" and "Hawaiians," as used by OHA, are racial classifications. *Rice*, 528 U.S. at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

In 1987, the Legislature of Hawaii identified a critical shortage of affordable housing units available to lower income residents of the state. *Office of Hawaiian Affairs v. Hous. & Cmty. Development Corp. of Hawai'i*, 177 P.3d 884, 897 (Haw. 2008) (*OHA*). The Housing Finance and Development Corporation (HFDC) was established by the State Legislature to, *inter alia*, develop fee simple or leasehold property, construct dwellings thereon, and sell, lease, or rent the property to qualified residents. *Id.* In the same year it was formed, the HFDC identified the Leiali'i parcel in West Maui, part of the ceded lands, as a potential site in need of affordable housing. *Id.* In 1990, after the Leiali'i parcel was reclassified from agricultural to urban use, the HFDC embarked upon a residential housing development project for the parcel, and invested $31 million into the project by 1994. *Id.* at 898.

In 1992, the Hawaii Legislature enacted Act 318 (codified as Haw. Rev. Stat. Ann. § 10-13.6 (1993)), establishing a formula to "pay" OHA for revenues from Leiali'i and another ceded lands parcel. Haw. Rev. Stat. Ann. § 10-13.6(e) (Supp. 2007). According to Act 318's formula, OHA was to be paid 20% of the fair market value of the subject lands. Haw. Rev. Stat. Ann. § 10-13.6(a).

In 1993, Congress passed a Joint Resolution (Apology Resolution) recounting the history of Hawaii in some detail, and offering an apology to the native Hawaiian people for the overthrow of the Kingdom of

Hawaii. Pub. L. No. 103-150, 107 Stat. 1510 (1993); *Rice*, 528 U.S. at 505. As a result of the Apology Resolution, OHA demanded that a disclaimer be included as a part of any acceptance of funds from the sale of Leiali'i parcel to preserve any native Hawaiian claims to ownership of the ceded lands. *OHA*, 177 P.3d at 897. In 1994, HFDC declined to include OHA's requested disclaimer because to do so would place a cloud on the title. *Id.* at 897-98.

OHA and four individual native Hawaiians filed suit against the State of Hawaii and HFDC in 1994, seeking an injunction to prohibit the selling or otherwise transferring to third parties any ceded lands. *Id.* at 891. The trial court denied plaintiffs' claims, *id.* at 899, but the Hawaii Supreme Court reversed, and ordered the trial court to grant an injunction prohibiting the State of Hawaii from selling or otherwise transferring to third parties any ceded lands until the claims of the native Hawaiians to the ceded lands have been resolved. *Id.* at 928.

The federal government, through the Hawaiian Homes Commission Act of 1920, the Admission Act of 1959, and the Apology Resolution; and the State of Hawaii through its Constitution provision creating OHA and its implementing statutes, instituted racial classifications by introducing and defining the terms "native Hawaiian" and "Hawaiian." This Court should grant the petition to hold that any claim to ceded lands derived from language in the Apology Resolution or Admission Act, or any other legislation purporting to grant preferences based upon the terms "native Hawaiian" or "Hawaiian", is presumptively invalid. Those terms were determined in *Rice* to be racial classifications and government actions relying on those

classifications must be subjected to strict judicial scrutiny.

Furthermore, the Apology Resolution is purposefully void of any language amending or rescinding the Admission Act, because congressional intent reveals that the resolution was not intended to change any existing laws. This Court must determine whether the state court had authority to divest Hawaii of its sovereign powers by requiring the state to hold the ceded lands for the benefit of one racial class in possible perpetuity.

REASONS FOR GRANTING REVIEW

I

RACE-BASED GOVERNMENT IS IMPERMISSIBLE UNDER CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION

Eight years ago, in *Rice*, this Court struck down as unconstitutional a provision in the Hawaii Constitution prohibiting non-"Hawaiian" citizens from voting in a statewide election. At that time, the Court reviewed Hawaii's troubled history of race relations and Justice Kennedy, writing for the majority, provided a sound approach to deal with the realities facing that State:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always,

> seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

Rice, 528 U.S. at 524. Justice Kennedy's starting point is just as important today as it was in *Rice*. Once again, Hawaii's history, and the laws that have been passed with good intentions to deal with the struggles of native Hawaiians, require this Court's attention. For only the mandates of the United States Constitution together with this Court's guidance can disentangle Hawaii from its race-based laws and restore the ideals of equal protection to state government.

A. This Court Already Held in *Rice* That "Native Hawaiians" and "Hawaiians" Are Racial Classifications

Government action dividing people by race is inherently suspect because such classifications "promote notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 493, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

If, as the Hawaii Supreme Court held, the Apology Resolution requires the State of Hawaii to prefer one group—defined by quantum of the "correct" blood or

ancestry—over other beneficiaries of the ceded lands trust, it violates the Equal Protection Clause. Implicitly relying on racial classifications without undertaking equal protection review, the Hawaii Supreme Court determined that native Hawaiians have a legal claim to ceded lands. The state court held that the State of Hawaii may not sell, exchange, or transfer 1.2 million acres of state land—the ceded lands—unless and until it reaches as-yet-undefined political resolution with native Hawaiians. *OHA*, 177 P.3d at 905. In other words, the State of Hawaii must manage virtually all state-owned land for the benefit of a single class defined by race, and not for the benefit of all of the citizens of Hawaii who are the beneficiaries of the ceded lands trust.

The statutory definitions of "Native Hawaiian"[3] and "Hawaiian,"[4] as used by OHA and by the United States in the Hawaiian Homes Commission Act, have

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[3] The statute defines "Native Hawaiians" as follows:

> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Haw. Rev. Stat. Ann. § 10-2 (1993).

[4] The term "Hawaiian" is defined by state statute as:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

Haw. Rev. Stat. Ann. § 10-2 (1993).

already been determined by this Court to be racial classifications. When it analyzed a Hawaiian-only voting requirement in *Rice*, this Court found that the statutory definitions were race-based definitions. *Rice*, 528 U.S. at 515 ("The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.").

Despite *Rice*, Respondent OHA continues to rely upon the same racial classifications to provide special programs and preferential treatment based upon race. Review is needed because the state court below endorsed those racial classifications and agreed that "native Hawaiians," as that term applies to OHA, are beneficiaries of the ceded land trust:

> As native Hawaiians, the individual plaintiffs are clearly beneficiaries of the ceded lands trust. Additionally, OHA, which is charged "with managing proceeds derived from the ceded lands and designated for the benefit of native Hawaiians," can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust.

OHA, 177 P.3d at 905 (citations omitted). Thus, the very premise of Respondents' lawsuit, that native Hawaiians are beneficiaries of the ceded lands trust, and thus have a race-based legal right to the ceded lands, was recognized and approved by the state court without conducting any equal protection analysis.

B. Government Action Providing for Race-Based Claims to the Ceded Lands Fails Strict Scrutiny

In *Adarand*, 515 U.S. at 223-24, this Court reviewed the history of equal protection jurisprudence and noted three general propositions:

First, all racial classifications imposed by the government must first be met with skepticism, *id.* at 223, because" '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant*, 476 U.S. at 273 (citation omitted) (plurality opinion of Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C. J.); *see also id.* at 523 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("[R]acial classifications [are] 'constitutionally suspect.' "); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.").

The second principle is that all racial classifications are reviewed under strict scrutiny, regardless of the race that is benefitted or burdened. *Adarand*, 515 U.S. at 224 (citing *Croson*, 488 U.S. at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in judgment)); *see also Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.).

Finally, the third proposition is one of congruence, *Adarand*, 515 U.S. at 224, in that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v.*

Valeo, 424 U.S. 1, 93 (1976); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

These three propositions led this Court to conclude that

> all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, 515 U.S. at 227. Thus, strict scrutiny must be applied to resolve whether race-based claims to the ceded lands are constitutional.

In the decision below, the Supreme Court of Hawaii based its holding on the Apology Resolution and did not consider whether the Resolution or the court's own holding offended equal protection principles. *OHA*, 177 P.3d at 920

> The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved.

When a state governmental entity, such as OHA, seeks to justify race-based remedies to cure the effects of past discrimination, the Court does not accept the government's mere assertion that the remedial action

is required. *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Rather, the Court insists on a strong basis in evidence of the harm being remedied. *Id.*

The Apology Resolution enumerates wrongs committed against the native people of Hawaii by agents and citizens of the United States leading to the overthrow of the Kingdom of Hawaii and its eventual annexation. Pub. L No. 103-150, 107 Stat. 1510 (1993). However, past societal discrimination alone cannot serve as the basis for rigid racial preferences. *Croson*, 488 U.S. at 505. States must identify the discrimination with some specificity before using race-conscious relief. *Id.* at 504. No specific instances of discrimination were documented before the court below.

Even if the Apology Resolution provided sufficient evidence of a compelling interest, the court below did not consider whether claims to the ceded lands, including claims to portions of revenues from the sale, lease, or rent from the ceded lands is a narrowly tailored remedy for individual discrimination. Respondents must show that preferential treatment afforded to native Hawaiians is not simply a product of "administrative convenience" in grouping together all native Hawaiians. *Cf. Croson*, 488 U.S. at 508.

"The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. Here, the state court below failed to conduct an equal protection analysis, and thus gave blind deference to the use of racial classifications.

C. Determining Who Should Be Classified as a "Native Hawaiian" or "Hawaiian" Is Repugnant to Our Constitutional Ideals of Equal Protection

The differing definitions of "Native Hawaiian" and "Hawaiian" provide another reason why this Court should grant the petition and reverse the state court. Determining who is, and who isn't, a member of some chosen race is divisive and offensive to our Country's notions of equality. *Cf. Plessy*, 163 U.S. at 552 ("Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race."). As Justice Stevens has emphasized, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 535 n.5 (Stevens, J., dissenting).

This case exemplifies this concern: both the Federal government and the State of Hawaii have enacted numerous laws with varying definitions based on percentage of Hawaiian ancestry for the purposes of determining eligibility for preferences. This race-centric approach only perpetuates and increases racial divisions. It has also spawned seemingly endless litigation, with the courts forced to undertake the distinctly suspect task of verifying racial bona fides and who properly qualifies as a "Hawaiian," and whether such classifications are proper. *See, e.g., Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (plaintiffs who claimed at least 50% bloodline asserted exclusive control over state programs to benefit "Hawaiians," currently open to anyone with one drop of Hawaiian

blood); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (limiting candidates for OHA trusteeship to those of Hawaiian ancestry unconstitutional); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (non-Hawaiian student challenged school's policy of giving preference to students of native Hawaiian ancestry).

II

ONLY THIS COURT CAN RESOLVE WHETHER THE APOLOGY RESOLUTION AMENDS OR RESCINDS FEDERAL LAW

A careful reading of Section 5(f) of the Admission Act does not distinguish native Hawaiians as being the sole beneficiaries of the ceded lands, nor does it require Hawaii to use the ceded lands for the betterment of native Hawaiians at all. Instead, it spells out five possible uses for the public lands, without providing that any portion of those lands or the proceeds thereof must be set aside exclusively for the benefit of racial Hawaiians. Admission Act § 5(f), 73 Stat. 6; *Rice*, 528 U.S. at 508. Even when the ceded lands were first annexed by the United States in 1898, they were committed to use for the benefit of all inhabitants of Hawaii, regardless of race. *See* Newlands Resolution, 30 Stat. 750 (Revenues from ceded lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.").

The court below, relying on the Apology Resolution, is prohibiting Hawaii from selling or leasing its public lands until the federal government reaches a political settlement with native Hawaiians

over the ceded lands. In effect, the Apology Resolution has been interpreted by a state court in a manner that amends the Admission Act by placing the interests of one racial class above the interests of all other racial groups in Hawaii in regard to the ceded lands. Only this Court can resolve whether the 1993 Joint Resolution of Congress, intended only as a symbolic apology, supersedes existing law and thus violates equal protection under the Fifth Amendment.

In 1993, both houses of Congress passed the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii (Apology Resolution). Pub. L. No. 103-150, 107 Stat. 1510. The resolution contains no express language recognizing, identifying, or creating a legal right by native Hawaiians, or any other group defined by race or ancestry, to any of the ceded lands. To the contrary, the Apology Resolution expressly provides that the resolution may not serve as a settlement of any claims against the United States. *Id.* § 3. In addition, the Apology Resolution provides no command or direction to any federal or State of Hawaii agency as to any general or specific implementing action. The Apology Resolution does not even mention or reference the Admission Act at all.

Nevertheless, the Hawaii Supreme Court interpreted the Apology Resolution to mean that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands." *OHA*, 177 P.3d at 901. But that contention is belied by the remarks by the senior senator from Hawaii, Senator Inouye, who said, "This resolution does not touch upon the Hawaiian homelands . . . . It is a simple apology." 103 Cong.

Rec. S14482 (daily ed. Oct. 27, 1993) (statement of Senator Inouye). The court below also ignored the Senate Committee on Indian Affairs, which reported that the Apology Resolution would "not result in any changes in existing law." S. Rep. No. 103-126, at 35 (1993).

No state court should have the power to remove a state's sovereign authority provided to it by the United States Congress. The Admission Act of 1959 provides the State of Hawaii with the express authority to sell or otherwise dispose of the ceded lands. The 1993 Apology Resolution does not contain any language amending, altering, modifying, or rescinding the Admission Act. And Senate Report No. 103-126 concluded that the Apology Resolution would not result in any change in laws. But without this Court's review, Hawaii's sovereign authority under the Admission Act is suspended indefinitely by the ruling of the Hawaii Supreme Court.

CONCLUSION

For the foregoing reasons, Amicus Curiae Pacific Legal Foundation respectfully requests that this Court grant the writ of certiorari.

DATED: June, 2008.

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AMICUS CURIAE BRIEF

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NO. 07-1372

FILED
JUN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF HAWAII, *ET AL.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

AMICUS BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WYOMING, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Joint Resolution To Acknowledge The 100th Anniversary Of The January 17, 1893, Overthrow Of The Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question presented is whether this resolution stripped Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—twenty-nine percent of the total land area of the state and almost all the land owned by the state—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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INTEREST OF THE AMICUS CURIAE STATES

The question presented in this case is whether a federal law stripped the State of Hawaii of the authority to sell, exchange, or transfer land it received from the United States at statehood. The amicus states have a vital interest in this question because every state admitted into the Union since 1802 has received grants of land owned, prior to statehood, by the federal government. *See Andrus v. Utah*, 446 U.S. 500 (1980). These grants of land from the federal government at statehood are part of a "solemn agreement" under which a state is admitted to the Union. *Id.* at 507.

Each Admissions Act or Enabling Act has its own terms, but many of the statehood grants impose trust duties on the recipient state affecting the administration of the lands and funds derived from them. *See Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 460 (1967). The amount of acreage granted to the states is substantial. "Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools." *Id.* 460 n.3 (citing *The Public Lands*, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963)).

Management of state lands is a complex undertaking for every amicus state, whether it involves lands owned by the state outright or lands subject to trust duties created at statehood. For example, the amicus State of Washington holds over 2.2 million acres in trust traceable to federal grants

at statehood. This land is held for several trust beneficiaries including common schools, universities, and several charitable, penal, and educational institutions. A sale or transfer of state lands must be consistent with the purposes of any trust obligations imposed. Wash. Rev. Code § 79.17.200(3); Wash. Rev. Code 79.11 (sale procedures). At any given time, state officials are reviewing dozens of land transfers or exchanges, all intended to benefit the citizens of the state generally or the various trusts.[1]

In each of the amicus states, state officials similarly ensure that every sale, exchange, or transfer is consistent with the requirements of state laws and any trust obligations. The record in this case describes the complex procedures that the State of Hawaii was required to follow in connection with the sale of its granted lands. App. 18a–21a. A restraint on selling, transferring, or exchanging state land disrupts transactions and derails the years of work and planning that go into land transactions. Such a restraint would cause incalculable harm to a state and to the state citizens who benefit from the use and management of state lands. The amicus states therefore support the petition for certiorari because the decision below held that a federal law caused such harm to a state and its citizens.

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[1] In Washington, pending trust land transactions are listed at http://www.dnr.wa.gov/BusinessPermits/Topics/OtherLandTransactions (last visited May 30, 2008).

REASONS FOR GRANTING THE PETITION

The Supreme Court of Hawaii misconstrued the 1993 Apology Resolution. Congress adopted the Apology Resolution thirty-four years after Hawaii statehood to offer an apology to "descendents of the aboriginal people" of Hawaii regarding the events that led to the end of the Hawaiian monarchy and establishment of the Territory of Hawaii. *See* App. 110a. Notwithstanding express language showing that Congress had simply adopted a symbolic apology, the Hawaii court held that the Apology Resolution singled out and diminished the state's title to lands received at statehood.

The Hawaii court found a substantive effect on the state's lands by concluding that the Apology Resolution "recognized that the native Hawaiian people have unrelinquished claims *over the ceded lands* . . . ." App. 32a (emphasis added). Based on this premise, the court held that the Apology Resolutions required the State of Hawaii to hold its state lands as a "*foundation* (or starting point) for reconciliation" of the native Hawaiian claims. App. 33a. The Hawaii court ruling affects 1.2 million acres granted to the state by the Hawaii Admission Act—all the state lands subject to the trust created by the Admissions Act for the benefit of all of Hawaii's citizens. *See generally Rice v. Cayetano*, 528 U.S. 495, 525 (2000) (Breyer, J., concurring) ("The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are 'native.'").

The twenty-nine amicus states and commonwealth ask the Court to grant the petition for two reasons. First, the rule of law adopted by the Hawaii court conflicts with this Court's holdings regarding lands granted to the states. This Court's decisions recognize that land cannot be taken from a state after it is granted at statehood. The Hawaii court's ruling to the contrary is inconsistent with the plan of federalism in the Constitution. Second, the case involves a gross misapplication of federal law to impair the title to the majority of the land owned by a sovereign state. A question of federal law of the magnitude presented by this case concerning the legal interests of a sovereign state in its state lands merits the attention of this Court.

A. The Hawaii Court Decision Impairing Title To State Lands Conflicts With Rulings Of This Court And With Principles Of Federalism

By concluding that the 1993 Apology Resolution restrained the State of Hawaii from conveying state-owned property, the Hawaii court announced a rule of law that conflicts with this Court's rulings that Congress cannot reclaim lands after the lands are granted to the state. Moreover, this direct impact on a state's title to land conflicts with the plan of federalism in such a stark and fundamental way that the Hawaii court should have held that the Apology Resolution did not intend to impair the state's title. *See Edward J. DeBartolo Corp. v Florida Gulf Coast Bldg. & Constr. Trades Coun.*, 485 U.S. 568, 575 (1988) (statutes should be construed to avoid serious constitutional questions).

1. Congress Cannot Strip A State Of Title To Granted Lands

Under the rule of law adopted by the Hawaii court, a post-statehood act of Congress has diminished a state's title to lands bestowed by the federal government at statehood. This interpretation of the 1993 Apology Resolution conflicts with this Court's recognition that "Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State." *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) (alteration in original) (recognizing that both the majority and dissenting justices agree with this principle).

The Hawaii court's ruling that the Apology Resolution created a restraint on the state's power to sell, convey, and transfer its property also conflicts with this Court's longstanding recognition that the specific enumeration of the purposes for which lands are granted in the Enabling Act for a state "is necessarily exclusive of any other purpose[.]" *Ervien v. United States*, 251 U.S. 41, 47 (1919); *Lassen*, 385 U.S. at 467 (applying this principle from *Ervien*). In both *Ervien* and *Lassen*, the Court held that when lands are granted subject to enumerated terms, the state must comply with those terms and that those terms are exclusive of inconsistent purposes engrafted by the states. It makes little sense to say that the specific enumeration of conditions in the grant restricts *a state* from changing the purposes of a grant, but that *the federal government* can change the terms of the grant and thereby diminish the

state's title to its lands. *See also Wilcox v. Jackson ex dem. McConnell*, 38 U.S. (13 Pet.) 498, 517 (1839) (Once the United States grants property to a state, "then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.").

The amicus states do not dispute the broad legislative powers of Congress. The 1993 Apology Resolution, however, is a symbolic statement concerning historic events. It is not general legislation that applies broadly to state property. *See Case v. Bowles*, 327 U.S. 92, 100 (1945) (lands granted to the states are not immune from general legislative powers of Congress). There is no precedent supporting the notion that Congress may single out lands previously granted to a state and impress upon them legal rights in favor of others.

2. The Hawaii Court Ruling Conflicts With Principles Of Federalism

Under the Hawaii court's ruling, the Apology Resolution affects a fundamental attribute of the state's title to its lands. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (property includes the rights "to possess, use and dispose"); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (an interest in real property is taken when a law eliminates all right to devise the property). By concluding that the Apology Resolution directly affects the state's power to convey and transfer state lands, the Hawaii court has adopted a construction of a federal law inconsistent with the plan of federalism.

A state's ability to survive as a sovereign state is seriously undermined if the title to its lands can be singled out and impaired by the federal government. A federal law that revokes or diminishes a state's title to lands bestowed at statehood would cause enormous impacts to a state's financial and governmental integrity. If federal law could strip a state of the title to its lands, then the state could be severely damaged. Such authority and consequences are inconsistent with the constitutional principles that the states are admitted on an equal footing with "parity as respects political standing and sovereignty." *United States v. Texas*, 339 U.S. 707, 716 (1950).

The Court has previously held that a state's sovereign interest in its lands ensures sovereign immunity from suit in federal court to quiet title to such lands. *See Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (Idaho's sovereign interests in state lands and waters precludes a federal court from examining a dispute over title to its submerged lands, absent a waiver of the state's Eleventh Amendment immunity). Just as the states have not consented to suit in federal court to quiet title to state lands, the plan of federalism does not allow federal law to diminish or strip the states of title to lands granted at statehood.

The rule adopted by the Hawaii court also runs afoul of the principle that while Congress may legislate, "it may not conscript State governments as its agents." *New York v. United States*, 505 U.S. 144 (1992). The Supreme Court of Hawaii has concluded

that the 1993 Apology Resolution conscripted state lands for the purpose of future negotiations over native Hawaiian claims. This undermines the federalism structure of the Constitution and with it the liberty of the citizens of the sovereign states.

> "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181.

The Court should therefore grant the petition because the rule of law adopted in Hawaii is contrary to the plan of federalism and undermines the sovereignty of the states.

B. The Petition Presents An Issue Involving A Substantial And Continuing Impact On A Sovereign State's Land

The question presented by the petition involves a matter of substantial importance because of the severe consequences of the ruling on the fundamental property and sovereignty interests of the states. The Supreme Court of Hawaii's interpretation of the 1993 Apology Resolution affects the title to over one million acres granted to Hawaii by the federal government under section 5(b) of the Admissions Act. App. 115a. The ruling thus restrains almost all of the land granted to a sovereign state at statehood. Further, the ruling

applies to twenty-nine percent of the land in the entire state.

The importance of the issue presented here is analogous to *Andrus v. Utah*, 446 U.S. 500 (1980), where the Court granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of [state] public lands . . . ." *Id.* at 506. It is also similar to *Lassen*, where the Court granted certiorari "because of the importance of the issues presented both to the United States and to the States which have received such lands." *Lassen*, 385 U.S. at 461; *see also* n.5 (citing a number of amicus states urging certiorari). Finally, the importance of the question is analogous to *United States v. Coleman*, 390 U.S. 599 (1968), where the Court reviewed a decision by the Ninth Circuit construing the scope of rights to take certain mining patents and the public land: "We granted the Government's petition for certiorari because of the importance of the decision to the utilization of the public lands." *Id.* at 601.

The Hawaii court ruling affects state lands on a scale comparable to these previous cases. And, the importance of the question presented is magnified because the ruling affects Hawaii's public lands for the indefinite future. There can be no certainty that a reconciliation process will ever resolve the disputes and claims connected with the United States admitting Hawaii and its people as a sovereign state.

Finally, certiorari will provide significant guidance regarding the legal consequence of the 1993 Apology Resolution and the import of a congressional

resolution that acknowledges historic events and offers a broad and symbolic apology.

CONCLUSION

The petition should be granted and the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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JOINT APPENDIX

113 (9)

No. 07-1372

Supreme Court, U.S.
FILED
DEC 4 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

B724

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 29, 2008
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Office of Hawaiian Affairs, et al.* v. *Housing & Community Development Corp. of Hawaii, et al.
First Circuit Court of the State of Hawaii
No. 94-0-4027

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* * *

HOUSE CONCURRENT RESOLUTION

Adopted by House of Representatives, April 15, 1993
Adopted by Senate, April 30, 1993

House of Representatives
Seventeenth Legislature, 1993
State of Hawaii

H.C.R. No. 179

REQUESTING THE PRESIDENT AND CONGRESS OF THE UNITED STATES TO ISSUE A FORMAL APOLOGY ON BEHALF OF THE UNITED STATES TO NATIVE HAWAIIANS FOR THE OVERTHROW OF THE KINGDOM OF HAWAII.

WHEREAS, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion; and

WHEREAS, a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii; and

WHEREAS, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887; and

WHEREAS, the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Mis-

sions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850; and

WHEREAS, in 1887 King Kalakaua was coerced into signing a new constitution, also called the "Bayonet Constitution", that extended voting privileges to American and European males regardless of citizenship and also required property ownership in order to vote, thus disenfranchising Native Hawaiians who did not own land; and

WHEREAS, many Native Hawaiians did not own land because the western concept of land as a commodity was foreign to their culture, causing many of them to ignore opportunities to own land, to give away their land, or to sell their land at extremely low prices; and

WHEREAS, in response to rumors that Queen Liliuokalani was on the verge of declaring a new constitution limiting the vote to Hawaiian-born or naturalized citizens, on January 14, 1893 members of the annexation club, a group advocating for the annexation of Hawaii to the United States, plotted to overthrow the monarchy; and

WHEREAS, the annexation club, led by Lorrin Thurston, sought and received the help of the United States Minister to Hawaii, John L. Stevens; and

WHEREAS, in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and naval representatives of the United States ordered armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government; and

WHEREAS, on the afternoon of January 17, 1893, the Committee of Safety, which represented the American and European sugar planters, descendents of missionaries, and financiers, deposed the Hawaiian monarch and proclaimed the establishment of a Provisional Government; and

WHEREAS, the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law; and

WHEREAS, soon thereafter, when informed of the risk of the bloodshed of her people if they resisted, Queen Liliuokalani issued the following statement yielding her authority to the United States Government rather than to the Provisional Government:

> "I Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> "That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.

"Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands."

Done at Honolulu this 17th day of January, A.D. 1893.; and

WHEREAS, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms; and

WHEREAS, on February 1, 1893 the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States; and

WHEREAS, the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States' diplomatic and military representatives had abused their authority and were responsible for the change in government; and

WHEREAS, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission; and

WHEREAS, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown; and

WHEREAS, President Cleveland further concluded that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy; and

WHEREAS the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States; and

WHEREAS the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred to in this Resolution as the "Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy; and

WHEREAS the Committee and its chairman, Senator John Morgan, conducted hearings in Washington, D.C., from December 27, 1893, through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii; and

WHEREAS, although the Provisional Government was able to obscure the role of the United States in the

illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation; and

WHEREAS, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii; and

WHEREAS, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was force by representatives of the republic of Hawaii to officially abdicate her throne; and

WHEREAS, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland; and

WHEREAS, on July 7, 1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii; and

WHEREAS, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States; and

WHEREAS, the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people or their sovereign government; and

WHEREAS, the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States; and

WHEREAS, the Newlands Resolution also specified that treaties existing between Hawaii and foreign

nations were to immediately cease and be replaced by United States treaties with such nations; and

WHEREAS, the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government; and

WHEREAS, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum; and

WHEREAS, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States; and

WHEREAS, on August 21, 1959, Hawaii become the 50th State of the United States; and

WHEREAS, the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land; and

WHEREAS, the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Native Hawaiian people; and

WHEREAS, the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions; and

WHEREAS, in order to promote historical and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the Native Hawaiians in the Hawaiian and the American societies; and

WHEREAS, the Eighteenth General Synod of the United Church of Christ in recognition of the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the Native Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the Native Hawaiians; and

WHEREAS, the Japanese American Citizens League, the oldest and largest Asian American civil rights organization in the United States, passed a national resolution supporting the indigenous Hawaiians in their struggle to address the federal government's illegal and immoral wrongdoing committed against them; and

WHEREAS, it is proper and timely for the Congress on the occasion of the one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the efforts of the State of Hawaii, the United Church of Christ and the Japanese American Citizens League; now, therefore,

BE IT RESOLVED by the House of Representatives of the Seventeenth Legislature of the State of Hawaii, Regular Session of 1993, the Senate concurring, that the President and Congress of the United States are requested to formally apologize to Native

Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination; and

BE IT FURTHER RESOLVED that the Legislature urges the President and Congress of the United States to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, and to support reconciliation efforts between the United States and the Native Hawaiian people; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the Chair and members of the United States Senate Select Committee on Indian Affairs, and the members of Hawaii's congressional delegation.

OFFERED BY: /s/ Tom Okamura

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 94-4207-11
(Declaratory Judgment)

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Plaintiffs,

v.

HOUSING FINANCE AND DEVELOPMENT CORPORATION, *et al.*,
Defendants.

[STAMP: 1ST CIRCUIT COURT
STATE OF HAWAII
FILED
1995 AUG 11 PM 3:24
R. HIGA
CLERK]

PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; EXHIBIT A; SUMMONS

Plaintiffs above-named, by and through their undersigned respective counsel, and for a complaint against the above-named Defendants, allege and aver as follows:

PARTIES

1. Plaintiff OFFICE OF HAWAIIAN AFFAIRS is a self-governing corporate body created pursuant to the Hawaii Constitution, Art. XII, §§ 5 and 6 to serve

as an advocacy instrument for the betterment of the native Hawaiians and Hawaiians.

2. Plaintiff CLAYTON H. W. HEE is the Chairman of the Board of Trustees of the Office of Hawaiian Affairs. Plaintiffs ABRAHAM AIONA, MOANIKE'ALA AKAKA, ROWENA AKANA, BILLIE BEAMER, A. FRENCHY DESOTO, CLAYTON H.W. HEE, KINA'U BOYD KAMALI'I, MOSES K. KEALE, SR., SAMUEL L. KEALOHA, JR. are members of the Board of Trustees of the OFFICE OF HAWAIIAN AFFAIRS. These Plaintiffs are referred to hereafter as "OHA Plaintiffs."

3. Plaintiff PIA THOMAS ALULI is a descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778 and accordingly is a "native Hawaiian" as that term is defined in Section 5(f) of the Admissions Act of Hawaii and the Hawaiian Homes Commission Act § 201 (a) (7) , (hereafter, the use of the term "native Hawaiian" is used as defined in Section 5(f) of the Admissions Act and HHCA § 201(a) (7)); and a descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands previous to 1778, and which peoples thereafter have continued to reside in Hawaii, and is therefore a "Hawaiian" pursuant to Haw. Rev. Stat. § 10-2 (hereafter, the term "Hawaiian" means in accordance with Haw. Rev. Stat. § 10-2) . Plaintiff ALULI is also a United States citizen and a resident of the County of Maui, State of Hawaii.

4. Plaintiff JONATHAN KAMAKAWIWO' OLE OSORIO is a Hawaiian. Plaintiff OSORIO is also a United States citizen and a resident of the City and County of Honolulu, State of Hawaii.

5. PLAINTIFF CHARLES KA'AI'AI is a native Hawaiian and a Hawaiian. Plaintiff KA'AI'AI is also a United States citizen and a resident of the City and County of Honolulu, State of Hawaii.

6. Plaintiff KEOKI MAKA KAMAKA KI'ILI is a native Hawaiian and a Hawaiian. Plaintiff KI'ILI is also a United States citizen and a resident of the County of Maui, State of Hawaii. The Plaintiffs described in paragraphs 3 through 6 are referred to hereafter as the "Aluli Plaintiffs.")

7. Defendant HOUSING FINANCE AND DEVELOPMENT CORPORATION ("HFDC") is a public agency of the State of Hawaii and is a body corporate and politic with perpetual existence. Defendant HFDC is sued for declaratory and injunctive relief and for money damages, pursuant to §§ 632-1 and 661-1, H.R.S.

8. Defendant ROY S. OSHIRO is Acting Executive Director of Defendant HFDC and is sued in his official capacity for declaratory and injunctive relief.

9. Defendants EDISON R. K. KEOMAKA, JOHN E. MIN, EARL ANZAI, DR. SEIJI NAYA, DONALD K. W. LAU, JAMES W. Y. WONG, NADINE K. NAKAMURA, and CLARENCE MILLS are members of the Board of Directors of Defendant HFDC and are sued in their official capacities for declaratory and injunctive relief.

10. Defendant STATE OF HAWAII and GOVERNOR BENJAMIN CAYETANO are Defendants herein. BENJAMIN CAYETANO is the duly elected Governor of the State of Hawaii and is sued in his official capacity along with the State of Hawaii for declaratory and injunctive relief.

JURISDICTION

11. This court has jurisdiction over the claims in this complaint under HRS §§ 632-1, 661-1, and 673-1 and 2.

THE ILLEGAL SALE OF CEDED LANDS

12. The facts of the illegal overthrow and taking of the lands of the Kingdom of Hawaii have been acknowledged by the U.S. Congress in Public Law 103-150, November 23, 1993, 103d Congress, S. J. Res. 19. The U.S. Congress has admitted that the taking of Hawaiian lands was illegal and has described history as follows.

In 1893 "a Committee of Safety that represented the American and European Sugar Planters, descendants of missionaries and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government."

In 1894, "the Provisional Government declared itself to be the Republic of Hawaii."

In 1898, "through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States."

In 1898, "the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." (See Public Law 103-150.)

In 1898, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."

13. In Public Law 103-150, Congress determined that it was "proper and timely" to "acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Hawaiian people . . . ."

Congress stated that it "apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1993 . . . ."

14. Defendant STATE OF HAWAII has been illegally alienating ceded lands which came from the Kingdom of Hawaii and the Hawaiian people to third persons who are not state entities and without regard for the claims of Hawaiians to those lands.

THE STATE'S FAILURE TO COMPLY WITH THE SPECIFIC PROVISIONS OF ACT 318

15. In 1992, the legislature enacted Act 318, relating to the development of housing utilizing land of the public land trust.

16. Act 318 set forth a scheme to compensate OHA for land from the public land trust which was to be conveyed from the DLNR to HFDC for housing projects. Under the statutory scheme, OHA was to be compensated for the taking of such lands by multiplying the fair market value of the land by 20%.

17. Act 318 directed OHA and DLNR to each retain an appraiser to determine fair market value of the land.

18. Fair market value was to be determined not more than ninety days before the conveyance of the land to the HFDC.

19. Both OHA and DLNR retained appraisers for the site of the Villages of Lealii Project (hereafter "Lealii ceded lands") and both appraisers completed appraisals and concluded the fee simple value of the subject property as of November 1, 1993.

20. On May 16, 1994, both appraisers agreed on a per acre price of $48,439.00.

21. On August 12, 1994, the board of HFDC agreed to the appraisers agreement.

22. On September 23, 1994, Attorney General Robert A. Marks recommended language to the OHA Board of Trustees that would permit Plaintiffs to accept payment from HFDC pursuant to Act 318, but at the same time would preserve the claims of the Hawaiian people to the land comprising the site of the Villages of Lealii Project. (See Attorney General Marks' letter dated September 23, 1994 to Chairman Hee attached as Exhibit A.)

23. On October 13, 1994, Joseph Conant agreed that the property needed to be reappraised because the statutory requirements had not been met.

24. On October 31, 1994, Joseph Conant agreed to reappraise the property taking into account the improvements made to the property.

25. On November 2, 1994, Joseph Conant stated the HFDC Board had instructed him that they would not agree to a reappraisal and that DLNR would be conveying the property to HFDC on the basis of the old appraisal.

26. On November 4, 1994, HFDC informed OHA that DLNR had conveyed the subject property to HFDC that morning. On the same date HFDC presented OHA with a check for 20% of the fair market

value of the subject property as of November 1, 1993. OHA rejected the payment.

COUNT I

STATE SALES OF CEDED LANDS VIOLATION OF ART. XII, SEC. 4, HAWAII STATE CONSTITUTION AND BREACH OF FIDUCIARY DUTIES AS CEDED LANDS TRUSTEE

27. Article XII, Sec. 4 of the Hawaii State Constitution provides:

> The lands granted to the State of Hawaii by Section 5 (b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

28. Upon Admission of Hawaii as a state in the United States, Defendants accepted trust obligations under a compact with the United States to hold the ceded lands in trust.

29. Because of these trust obligations, the sale of the fee title to the ceded lands of the public trust is prohibited. Contrary to these provisions, Defendants are planning the sale of the fee title to ceded lands to third persons who are not State entities (hereafter "third persons").

IRREPARABLE HARM

30. Plaintiffs will suffer irreparable harm from the State's plans to alienate ceded lands to third persons as alleged above on the grounds that:

a. alienation of the land to a third party will erode the public land trust and the entitlement of the Native Hawaiian people;

b. violate the Hawaii State Constitution and Admissions Act.

PUBLIC INTEREST

31. The preservation of Native Hawaiian claims are in the public interest.

32. There is no adequate remedy at law.

33. Accordingly, Plaintiffs are entitled to an injunction to stop the sale of any ceded lands to third persons.

COUNT II

PROPOSED STATE SALE OF LEALII LANDS VIOLATION OF ART. XII, SEC. 4, HAWAII STATE CONSTITUTION AND BREACH OF FIDUCIARY DUTIES AS CEDED LANDS TRUSTEE

34. Article XII, Sec. 4 of the Hawaii State Constitution provides:

> The lands granted to the State of Hawaii by Section 5 (b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

35. Upon Admission of Hawaii as a state in the United States, Defendants accepted trust obligations under a compact with the United States to hold the ceded lands in trust.

36. Because of these trust obligations, the sale of the fee title to the ceded lands of the public trust of the Lealii ceded lands is prohibited. Contrary to this provision, Defendants are planning the sale of the fee title to the Lealii ceded lands to third persons.

IRREPARABLE HARM

37. Plaintiffs will suffer irreparable harm from the HFDC's process as alleged above on the grounds that:

a. alienation of the Lealii ceded land to a third party will erode the public land trust and the entitlement of their people;

b. violate the Hawaii State Constitution.

PUBLIC INTEREST

38. The preservation of native Hawaiian and Hawaiian claims are in the public interest.

39. Accordingly, Plaintiffs are entitled to an injunction to stop the sale of Lealii ceded lands to third persons.

COUNT III

DECLARATORY JUDGMENT

40. For the stated reasons, in the event the Court does not fully grant Plaintiffs the above requested injunctive relief, Plaintiffs additionally or alternatively request a declaratory judgment that (a) any conveyance to a third party violates the Hawaii State Constitution and the Admissions Act, (b) and/or any sale of ceded lands does not directly or indirectly release or limit claims of Native Hawaiians to those lands. (See Exhibit A).

COUNT IV

VIOLATION OF ACT 318 AS AN ALTERNATIVE COURT

41. This Count is alternative under Rule 18(a) HRCP and is being asserted in order to preserve the claim.

42. In the event the Court does not grant Plaintiffs the injunctive and declaratory relief requested in Counts I, II and III above, the OHA Plaintiffs alternatively request the following declaratory relief.

43. Act 318 [SLH 1992] requires the HFDC to pay OHA its prorata share of the fair market value of the subject lands based on its fair market value, as determined by an appraisal performed not later than 90 days before the conveyance of the subject lands by the Board of Land and Natural Resources to the HFDC.

44. Despite an initial agreement to perform a timely appraisal pursuant to the process outlined in Act 318, the HFDC refuses to perform a timely appraisal before tendering payment of OHA's statutory share of the fair market value of the subject lands.

45. The acts of HFDC and DLNR are in violation of HRS section 10-13.6 including but not limited to an illegal conveyance based on fair market value determined more than ninety days before the conveyance of the subject property to HFDC.

46. Accordingly, the OHA Plaintiffs are entitled to a judgment declaring that the HFDC is violating Act 318 by tendering payment based on the existing appraisal of the Lealii ceded lands to OHA and enjoining the HFDC and other Defendants from basing their tender of payment to OHA under Act 318 on any existing appraisal.

COUNT V

VIOLATION OF ACT 318 AS AN ALTERNATIVE COUNT

47. This count is alternative under Rule 18(a) HRCP and is being asserted in order to preserve the claim.

48. In the event the Court does not grant Plaintiffs the injunctive and declaratory relief requested in Counts I, II and III above, the OHA Plaintiffs alternatively request the following injunctive relief:

a) Appraisal at the fair market value of the Lealii ceded lands ninety days before the date of conveyance between the Department of Land & Natural Resources and the Housing Finance & Development Corporation;

b) Payment to OHA in accordance with Act 318, 1992 Legislature.

WHEREFORE, Plaintiffs pray as follows:

1. Injunctive relief barring Defendants from conveying and alienating any ceded land from the public land trust to third parties.

2. Injunctive relief barring Defendants from conveying and alienating any of the ceded lands comprising the site of the Villages of Lealii project from the public land trust to third parties.

3. Declaratory Judgment finding that: (a) any State conveyance to a third party violates the Hawaii State Constitution, the Admission Act and/or (b) any State sale of ceded lands to third persons does not directly or indirectly release or limit the claims of Native Hawaiians to those lands, and/or (c) with respect to the OHA Plaintiffs HFDC is violating Act 318 by tendering

payment to OHA based on the existing appraisal of the Leali'i Lands.

4. In the event the Court does not grant Plaintiffs the injunctive and declaratory relief requested above, the OHA Plaintiffs alternatively request the following injunctive relief:

a) Appraisal at the fair market value of the subject lands ninety days before the date of conveyance between the Department of Land & Natural Resources and the Housing Finance & Development Corporation,

b) Payment to OHA in accordance with Act 318, 1992 Legislature.

5. Attorneys' fees and costs pursuant to HRS §673-5(b).

6. Such other appropriate relief ordered by the Court.

DATED: Honolulu, Hawaii, August 9, 1995.

/S/

Sherry P. Broder
Attorney for Plaintiffs
Office of Hawaiian Affairs,
Abraham Aiona, Moanike'ala
Akaka, Rowena Akana, Billie
Beamer, A. Frenchy DeSoto,
Clayton H. W. Hee,
Kina'u Boyd Kamali'i,
Moses K. Keale, Sr.
and Samuel L. Kealoha, Jr.

/S/

William K. Meheula, III
Jervis Winer and Meheula
Hayden Aluli
David Liu

Attorneys for Plaintiffs
Pia Thomas Aluli, Jonathan
Kamakawiwo'ole Osorio, Charles
Ka'ai'ai, and Keoki Maka Kamaka
Ki'ili

EXHIBIT A

[State of Hawaii
Department of the Attorney General
letterhead]

September 23, 1994

SENT VIA FACSIMILE & U.S. MAIL

The Honorable Clayton Hee, Chairperson
Board of Trustees
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, Hawaii 96813-3249

Dear Mr. Hee:

As you requested, the following language was drafted for the Board to insert into its action order for its September 15, 1994 Villages of Leali'i agenda item, to document the action taken on that item:

> By agreeing and accepting the provisions set out in the August 29, 1994 letter from Joseph K. Conant, Executive Director, Housing Finance and Development Corporation, State of Hawaii, and, in the future, accepting payment of the sum specified as payable to the Office of Hawaiian Affairs by the Corporation in that letter, the Chairperson, and members of the Board of Trustees of the Office of Hawaiian Affairs, and the Office of Hawaiian Affairs, act solely for the purpose of implementing the provisions of Act 318, SLH 1992, and only on behalf of the Office of Hawaiian Affairs, and in no manner do they waive or otherwise act in fur-

therance of diminution of any claim the Hawaiian people may have to the land comprising the site of the Villages of Leali'i project.

Very truly yours,

/s/ _____

Robert A. Marks
Attorney General

RAM/CMA:nk
c: Joseph K. Conant

[Summons omitted]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

Civil No. 94-0-4207

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Plaintiff,

v.

HOUSING FINANCE DEVELOPMENT CORPORATION, *et al.*,
Defendant.

TRANSCRIPT OF PROCEEDINGS

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before the Honorable SABRINA SHIZUE McKENNA, Judge,
Twenty-Second Division, presiding, on Tuesday, November 20, 2001.

HEARING: 1) Defendants' Motion for Protective Order RE: Earl Anzai filed 11/19/01
2) Jury Waived Trial

* * *

Honolulu, Hawai'i, November 20, 2001, 1:25 P.M.
--oOo--

THE COURT: All right, the record will reflect the presence of counsel.

We'll go ahead and hear from the Plaintiffs' first witness.

MS. BRODER: The Plaintiff would like to call professor Daviana McGregor.

THE COURT: Thank you.

THE CLERK: Good afternoon. Please come up and take the stand.

Thank you.

THE COURT: You could remain standing and raise your right hand, please.

DAVIANA MCGREGOR

called as a witness by the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth and nothing but the truth.

THE WITNESS: Yes, I do.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MS. BRODER:

Q. Professor McGregor, would you please state your name and address for the record.

A. Davianna Pomaka'i McGregor, 1942 Nau Street, Honolulu, Hawai'i. (?)

Q. Professor McGregor, I put all the exhibits I'm going to be referring to during your testimony.

MS. BRODER: And, Your Honor, I've given the list to your clerk. She's pulling those exhibits out.

THE COURT: All right.

Q. The first exhibit I would like you to take a look at is Exhibit 18, which is your curriculum vitae.

And, Professor McGregor, you have—what is the highest degree that you've achieved?

A. I have a Ph.D in history from the University of Hawai'i, Manoa.

Q. And what was your Ph.D thesis on?

A. My dissertation topic or my title Kupa'a I Ka 'Aina: Persistence on the Land. And, it focused on the conditions made Hawaiians the first 30 years that Hawai'i was incorporated as a territory by the United States.

Q. And, if you could take out Exhibit Number 19, I believe that's your Ph.D. thesis.

A. Yes.

Q. And could you describe for the court what is the—what are the basic thesis of your thesis.

A. Well, the thesis first—

THE COURT: Counsel, I'm sorry.

Q. Yes.

THE COURT: —dissertation or thesis. I think it's right.

Q. Okay. Could you describe the basic principles that you were investigating in your Ph.D thesis.

A. Well, in my dissertation as I gathered the formation the conclusions that I reached were one that the in the period from 1900 to 1930 you have a distinction develop between urban Hawaiians and rural Hawaiians because many Hawaiians living in rural areas, especially because of the expansion of the sugar industry

and the plantations expanding to include more Hawaiian Kuleana lands and the diversion of waters that fed taro diverse sugar many Hawaiians in rural areas were forced to move into cities as you have a migration in a urban population beginning to develop.

And, in the process those Hawaiians who move into the city have to assimilate to greater degree than those who remain back in the rural communities in order to adjust to life in the city and to get a job and to get a house and to earn a wage.

So, what I found is that there are throughout the islands by 1930 still rural communities that are very distinctly native Hawaiian in which about 90 to 95 in some cases 98 percent or in the case of the island of Niihau a hundred percent of the people living in those districts are predominantly native Hawaiian or are native Hawaiians.

And, in those districts there's a stronger continuity of Hawaiian custom practice and belief because those beliefs and customs and practices serve to inform the families living in those communities about how to subsist from fishing and farming traditionally.

So, all of the tradition knowledge that was passed on from them one generation to the next informed them about how to subsist in very rugged isolated conditions and rural Hawaiians there didn't have a lot of the amenities that those living in rural areas beginning to acquire no running water, electricity, none of the modern type conveniences that were developing yet they chose to remain in those areas and live because that is what they were accustomed to. But, also, in a way it was a form of quiet resistance a withdrawal form of resistance of the changes that were being informed in the American system in Hawai'i.

And, so, I called these areas culture kipuka. Kipuka is from the rain forest in the volcano area that Pele has gone through and covered the land with lava but she leaves behind these oases of forest, old world forests, where you have complete the old trees as well as hapu ferns. Gradually where the lava has been covered over the forest it begins to regenerate from the kipuka that—from the kipuka the birds eat the seeds and the wind blows the fern spores and gradually the land comes back to life on the raw lava.

Q. Can you tell us which communities you identified kipukas that you studied.

A. Right. The culture kipukas those areas that were left by the wayside mainland economic development. And, I studied the island of Moloka'i as a whole an example of an island although Ni'ihau would be another example of an island by-passed by this kind of economic development.

And, then I studied as a Moku as an example of a Moku district of Hana actually Ko'olau District of Maui from Ha'i-ku over to Ka-naio.

And, then as an example of an Apua, I studied the Wai-pi'o Valley as an example. But there are other districts such as Milo-li'i in Kona and on this island Kahana and the La'ie, Hau-'ula, La'ie area. And, on Kauai Anahola, Moloka'i Kekahi side. And, also on Mauai, Ka-'akau-lua also on Hawaii Island the Puna District the Ka'u District that were areas that this continuity of Hawaiian custom and belief and practice.

Q. So, what were your findings from looking at these different communities with regard to Hawaiians and their relationship to the land?

A. Well, the relationship to land continued to be one as an ancestor that for all of these families the land was part of Ohana and they treat the land as a member of the family.

The kupuna, I—for this study I listened to interviews that Mary Pukui conducted in the Puna Districts and she was at the time studying place names. And, so, you know, the kupuna gave names to the different features of the land like they would give a name to a child. And, they named their land features for its characteristics as we name our children when they are born, you know, we see certain kinds of features that we anticipate we give them a name that would reflect that.

And, then as people continue to hunt or gather on the land, they're always conscious of how the—what the condition is of the various resources. And, if there's someplace that's in stress then, of course, they won't continue to gather or fish there. They might even go and replant an area that's in stress. And, so, they're always very conscious of the condition of the land and their responsibility to care for the lands the same responsibility we have to care for members of their family.

Q. Can you—can you understand Hawaiian language?

A. Yes, I can read very well and translate using the dictionary. And, I speak it, but, I wouldn't say that I'm fluent, but, I'm competent in the language.

Q. Well, when you listened to the tapes of Mary Pukui, were those in Hawaiian or were those in English?

A. They were in Hawaiian and some were transcribed and then some had been translated but not all.

Some of them were just in Hawaiian. I had to translate them.

Q. Where did you listen to those tapes?

A. In the Anthropology Department of Bishop Museum.

Q. So were those interviews of people from that time period that you were describing 1900 to 1930?

A. They would have been born in that area. They were in their sixties or seventies in 1950's so they would have been young, maybe younger teenagers to young adults, young adults to older parent age makua in the 1930's.

But the dissertation then also looks at what happened to the Hawaiians who were living in the city and I tracked the origin the development of the Hawaiian Homes Commission Act because—because native Hawaiians who lived in the city were in very dire conditions tuberculosis was rampant at the time and there were not enough houses in Honolulu to accommodate all the people moving in, people lived in squatter camps, you know, in the Kaka'ako area of Iwilei.

There was a whole movement by the Ka'apua'anua Hawaii, the Hawai'i Protection Association, to lobby in Congress—well, first, Hawai'i Territorial Legislature and Congress to set aside the Crown lands for native Hawaiians to settle upon in order to be rehabilitated to their former vibrancy as a people.

Q. Did you do original research on the department? Before you answer the question, I just want to let the court know now we're hearing all these Hawaiian words, but we will prepare a glossary for the court and the court reporter for all the Hawaiian terms that are being used.

Did you do—what type of research did you do on the Department of Hawaiian Homelands and passage of the Hawaiian Homelands Commission?

A. I researched Hawaii State Archives in the files of Prince Kuhio and I looked up newspapers and accounts in Mid Pacific Magazine or newspapers at the time and then in Congressional records and hearings that were held on the Hawaiian Homes Commission Act.

Q. Have you more recently conducted research into the Hawaiian Homes Commission Act?

A. Yes. In spring of 2000 I was a Smithsonian scholar in residence and had the opportunity to spend the six months at the National Archives researching the passage of the Hawaiian Homes Commission Act.

And, then, I also researched the origin and intent of the sections in the Admission Act which mandate the stay of a compact with the federal government to continue to administer the Hawaiian Homes Commission program while the State retained federal oversight and also the origin intent of the section Admission Act which set up as one of the purposes for the ceded public lands trust to better the conditions of native Hawai'ians defined by the Hawaiian Homeland Commission Act.

Q. To your knowledge, has anyone done as extensive research on the Hawaiian Homelands Commission except yourself?

A. I don't know of any other historian who has done this research scholar that might be people within the Department who have done extensive research because it's related to their responsibilities.

Q. Okay. So, in researching and preparing a Ph.D thesis what were your findings with regard to the passage of the Hawaiian Homelands Commission Act?

A. Well, that the Hawaiian Homes Commission Act was clearly an effort by the U.S. Congress to acknowledge that there is a trust responsibility that the federal government has for native Hawaiians. And, in fact, Secretary Lane of the Department of Interior at the time specifically says that when you look at it is as if the Hawaiians were wards of the federal government and that the federal government Congress federal government have a trust responsibility for the native Hawaiians and acknowledged that the native Hawaiians did have a special interest in claim to the—particularly to the Crown lands since that was the original version of the bill and, you know, to the ceded lands in general. But, it is clear to me from reading the history of the passage of the Hawaiian Homes Commission Act and then it's inclusion of the Admission Act that the Congressional senators and representatives who were making these decisions did recognize one, a trust relationship for native Hawaiians, and, second, that native Hawaiians had a special claim and entitlement to the ceded public lands.

Q. What, in particular, led you to conclude that—that there was this finding this special interest in the Crown lands?

A. Well, the main argument presented it to the Congress at the time from Prince Kuhio and—

Q. Prince Kuhio, who was he?

A. Prince Kuhio was the delegate to Congress at the time and the main sponsor of the legislature. And, then there were territorial legislators who went up to

testify on the bill and then their main argument was that the Crown lands—the native Hawaiian people at the time of the Mahele should have gotten one-third of the lands distributed to them. And, the common people did not get one-third of the land distributed to them. They got, you know, less than one percent of the land distributed and that the Crown Lands were held in trust for the benefit of the native Hawaiian people and that if the monarchy had continued to be in existence that the lands would have ultimately been distributed to the native Hawaiian people.

And, Congress accepted that argument. And, then in the hearings regarding the inclusion of this section and Admission Act, the—the Department of Interior representatives at the time the legal counsel to the Department of the Interior at the time presented those justifications to the committee that—that these lands were being set aside for the native Hawaiians because they—they—they had never received their fair portion of the distribution at the Mahele and that the monarchy had intended these lands to be a trust for the native Hawaiian people.

Q. When you say the monarchy had intended the trust to be for native Hawaiian people, you mean just the land set aside by the Hawaiian Home Commission Act?

A. No. I'm referring to the Crown lands that the argument they were putting forth that the Crown land were intended.

Q. What is the definition of Crown land?

A. The Crown lands were identified as Crown lands at the time of the Mahele there were some 984,000 acres that were designated—actually, they

were initially designated as the lands of the King Kamehameha the III, Kauikeaouli, and then when he passed on they—they pass on to Kamehameha IV as his heir and then Kamehameha IV passed on and Queen Emma made a claim to those lands part of her dowry right interest to inherit a share of those lands and then the legislature and the supreme court found the lands did not belong—were not the personal property of the King but belonged to the institution monarchy and then they subsequently passed a law in 1865 to clarify that the lands were not personal property of the monarchy but belonged to the institution of the monarchy.

Q. So, what is the difference between government lands and the Crown land?

A. The—There was some 1.5 million acres that were designated as government lands and that was to be used by the government to conduct its affairs roads and highways and harbors and other purposes and they were—they were clearly for the emerging government to control separate from that of the King and monarchy.

Q. But did there come a point in time when basically the Crown lands and government lands were combined and became the public land?

A. Well, that occurred after the overthrow of the Hawaiian monarchy. And there's a period of time when the provisional government presumably assumed its control over these lands. And, when the—when they established the Republic of Hawai'i in July of 1894 one of the first acts of the Republic legislature was to claim ownership to the Crown and government lands and begin to treat those lands jointly as public lands and not make a distinction because in their mind they had—

they had replaced the monarchy and it no longer existed.

Q. Let's go back to the Mahele and if you could explain in a little bit more detail how it happened that the common Hawaiians did not get their share of the land at the time of the Mahele.

A. Well, the system of private property ownership was unfamiliar to the Hawaiians. There was no word for private property in Hawaiian. And so when the announcement came that the Native Hawaiians could file claims there was first little understanding of the need and purpose for this.

Secondly, word did not go out to all—equally to all of the islands. For example, I've come across a letter in it was either January or early February of 1848 from residents in the Puna district asking for the deadline to file their claim to be extended because they had only just heard of the law and the need to file their claim. In addition, they had to pay a $25 fee to have the land surveyed. And, while that seems like a small amount to us, it was a huge amount to Native Hawaiians who were not in the market economy and had no access to cash, were not wage workers but were primarily farmers and fishermen and so they would have to sell what food they had—were raising for their subsistence to get some cash or go and hire themselves out for pay wages to get any kind of cash to afford the cost of a survey. And, they had to make a claim against the chief or the (?) Kunahiki for this. And, I've also come across evidence, for example, on Maui that one of the chiefs intimidated the common people from filing claims and discouraged them from filing claims against him.

So, there were a number of reasons why the people didn't file a claim.

Q. Okay. Could you just explain how was Prince Kuhio selected to be the Hawai'i delegate to Congress. Was that by election or by appointment?

A. Oh, that was by election in 1902.

Q. And, I guess, you earlier explained to us that some of your research and background and experience relating to the Hawaiian Homes Commission Act. Now, we've been talking more about the 19th century history.

Could you explain to us what your background and research has been in the 19th century as well.

A. I—My Masters thesis was on Hawaiian resistance in the 19th century and focused on the Wilcox Rebellion of 1889 which was in opposition to the famous Constitution campaign in '87.

I've researched mainly forms of resistance by Native Hawaiians throughout the nineteenth century.

While I don't have a chapter in my dissertation on the 19th Century, I published an article called Cultural and Political History of Native—Hawaiian Native People which does provide an overview of Hawaiian society through the overthrow of Hawaiian monarchy.

So, I've done a lot of research both secondary and primary sources.

Q. And, when you say primary sources, are you referring to documents in English and Hawaiian?

A. Yes, I am.

Q. And, you say you got your Ph.D from the University of Hawai'i. How many other—how many—were you one of the first Native Hawaiians to get a Ph.D thesis in Hawaiian history?

A. Yes. I was probably the second or third—Kane was the first. And, I guess, I was the third. I think Lilikala Kame'eleihiwa was the second. There might have been others. I think I was about the third or fourth Hawaiian to get a degree in history.

Q. Are you—is this the first generation of Hawaiian scholars? Are you the first generation of Hawaiian scholars in Hawaiian history?

A. No, I wouldn't say that. Samuel Kamakau and David Malo who are the first generation of Hawaiian historians. But in—in the post, you know, post renaissance period we're the current more recent generation of university trained historians.

Q. Well, Sam Kamakau, I mean, what year was that?

A. That was in 1845 he attended Lahaina Luna.

Q. 1845. So, your generation, were there any Hawai'ian history scholars in Hawai'i who read and speak the language?

A. Again, yes, but, not we're not formally trained. The University Ph[illegible] Historians, we would be the first generation. But, there were other historians who were trained in traditional Hawaiian matters Mary Kawena Pukui in her own way, John Napeahi (?) and his wife. There were many historians from that earlier period but not university trained.

Q. Okay. Well, how would you characterize the difference in your research say and research published in the late nineteen hundreds in English?

A. I guess the main difference would be when I did my Masters I had not yet mastered Hawaiian. And, then after I finished my Masters, I went on to learn

Hawaiian, and, you know, take all the four year and translation courses so that for my dissertation I could have access to the Hawaiian language documents. And, Tai Kendall (?) did not—he primarily used English documents. He didn't observe an overview collection overview major English source documents available.

Q. Did his collection include Native Hawaiian Island newspapers and other sources?

A. No. No, he didn't use the Hawaiian newspaper except those that were bilingual.

Q. Were there many Hawaiian newspapers in the 19th century, Hawaiian language newspapers?

A. Well, they were well read. I don't know that there were—there may be three or four in circulation and you had on different islands but they were—they had a wide publication. And, I don't know what the numbers would be. But they were certainly widely read.

Q. Well, when you say that you used Hawaiian language materials in your research, did you utilize the newspaper and what else?

A. Well, the newspapers, I would read the Hawaiian version of laws so I can see how the difference in translation between what the Hawaiian thought would have been as compared to what was translated into English. And, then the oral histories that—well, that's not 19th Century. In the 20th century I used the oral histories that Mary Kawena Pukui conducted in Hawaiian.

Some of the other land records that I might have looked up just to see that the translation matched with what my understanding was. But mainly it would be

the Hawaiian language newspapers that were the major Hawaiian language source that I used.

Q. So, if we were to take a look at page three on your resume this has a list of your areas of research and teaching interests. Are those—is that a complete list of your areas of research and teaching?

A. Well, I also teach a course on economic change on Hawaii's people and ethnic identity and race relations generally. This was just looking at my areas of research in relation to Native Hawaiians in particular.

And, I've also researched the—well, the Pacific more than just the independent movements the history of some of the islands as I'm trained in both Hawaiian and Pacific History.

Q. Okay. Well, returning back to your Ph.D thesis and the kipukas that you studied, you were earlier describing, I guess, some of the relationships that Hawaiians have with land and water that you learned in preparing your Ph.D. thesis. Were there any other findings that you came to as a result of that research with regard to the Hawaiian relationships with land, water and ocean?

A. Well, I tried to understand why the areas that I—that Hawaiians continued to live in were—were bypassed by the main stream economic political development and was there anything special about, you know, these particular areas.

And,—I mean aside from the fact that they were more isolated in terms of Hawaiian spiritual beliefs, these were all places of great spiritual power and associated with important Native Hawaiian deities.

And, you know, the island of Moloka'i has always been a center of the training of Kahuna in various lev-

els and specialties. One of the epithets for Moloka'i is Moloka'i Pule of the strong Prayer which means there's a very strong mana among the people in the land of Moloka'i.

And, in Waipio as well, you know, their association with major gods being Kanaloa. And, while I didn't include Puna District in my dissertation, I did some research there to see if I wanted to include it and subsequently have done research there. Puna as opposed to kipuka is an area that is dedicated to Pele and the volcano deities. So, these places are also important places of spiritual power or what we could call Wai'ona and in a sense Hawaiians who continued to live there were the stewards of that spiritual power and mana and that is very much a part of the perpetuation of the culture as well. It's a spiritual physical social cultural perpetuation and so religious beliefs even though Christianity entered these areas in the 1840's Hawaiian, you know, it was like 20 years after the missionaries had begun to convert Hawaiians in Lahaina and Honolulu to Christianity.

And, so it entered a later period of time in these areas and pretty much have to co-exist with the Native Hawaiian beliefs and customs perhaps because they continued to be so strongly held and practiced in these areas.

Q. Well, how would those spiritual values and beliefs relate to the Hawaiian land?

A. Well, you know, the kupuna that I've talked to told me there's three aspects in the Hawaiian belief. And, it's all a higher role view is called Lokahi or unity and harmony. And, one is aloha ke Akua to love the gods or Aloha Napua, love the gods and Aloha Aina,

love the land and nature and Aloha Lokahi to love and respect one another.

And, together you need to as a human to be in balance with nature and with your deities and deities of nature in order to be a healthy person. So, that when we're looking at the health of the people, individuals, we're not only looking at physical health but mental health and spiritual health and we look at it holistically.

And, for Hawaiians the ideal then is to be Lokahi have Lokahi or to be in balance you have yourself in balance with nature and with your gods and then you can be a whole person.

But, if something is—if you're—if you as a Hawaiian allow something bad or a negative impact to occur to lands that you are responsible for, oceans that you are responsible for then that burden is your kauma'a is your very serious burden that you have to carry and it can affect your mental health and affect your physical health as well. So you have to as Hawaiian take responsibility for the land and for your family and for the resources all around you and respect the deity, the life that gives the life force to those resources and keep all that in balance.

Q. Okay. If the State of Hawai'i tried to satisfy the Native Hawaiians by selling land and paying them either through OHA or otherwise cash, in your opinion would that suffice?

MR. KOMEIJI: Your Honor, object. This is an improper opinion. Calls for speculation also.

MS. BRODER: Well, she's an expert in Native Hawaiian history and culture and has a very unique knowledge and a specialty in studying Hawaiian culture

and history and has studied the stories of old as well as some of the new.

And one of the contentions of the State in this case A.G. opinion 9503 is that the State can sell ceded lands and just pay OHA and that that is a cash payment suffice to say obligation to one of the beneficiaries. And, it is our position that it does not.

THE COURT: All right, objection is overruled.

Q. Can you—could you answer the question. Do you remember?

A. Well, you know, I think there might have been a time when Hawaiians sought reparations as a solution to the problem but that was at a time before Hawaiians really got reconnected with who we are as a people and with our you say I call it the soul, our soul as a people. And,—but, I have to step back and not be personal about this. But, if I look—if we look at movements like the Protect the Kaho'olawe Ohana or the Pele Defense Fund or the Makana, the Hui Malama Makana or Malama Moe Momi, these groups have gone beyond being satisfied with money as a form of repairing the harm that was done to the Native Hawaiians physically and mentally and socially and culturally. And, they—these groups, for example, know that what's important is protecting the land from destruction and protecting the land and keeping the land under the stewardship of Native Hawaiians and would not be satisfied with reparations but see the importance of having the land itself returned under the stewardship of a Native Hawaiian people, Native Hawaiian nation.

So, I admit if you look historically there was a whole movement for reparations under Aloha Vigilance

of Hawaiian Ancestry advocated for reparations that resulted in the Hawaiian study commission report.

But, certainly the Hawaiian groups who have been—especially those coming out of the rural communities because Protect Hawai'i Ohana came out of Moloka'i and was led by men and women kupuna from Moloka'i and joined by the kupuna and Ka-naio and Hana. And, you look at the movement of Pele Defense Fund, you look at groups like Hui Malama Momi, these groups are rooted in rural communities and have a stronger spiritual base and cultural base than, you know, groups that came out of, you know, political more politically based as I would call them such as the Aloha 'Aina which was a political movement.

And, so because of that the Hawaiian people as a whole have gone beyond that and recognized that the importance of reconnecting the Native Hawaiian people to the land and taking on the responsibility to the Aloha 'Aina to Malama the land and to care for it and respect it. And that is evidence in those—those organizations.

Q. Are you involved in the Kaho'olawe restoration project.

A. I'm a member of the Protect Kaho'olawe Ohana.

Q. And, what does that group do for Kaho'olawe?

A. We are stewards for Kaho'olawe and we conduct religious ceremonies on the island. We have members who serve on the save Kaho'olawe ceremonies to assist the state and see to the clean up of the island with the view that as is stated in Chapter 6 K of the Hawai'i Revised Statutes that the island will eventually be returned to a sovereign Hawaiian entity when it is established and recognized.

And, the Protect Kaho'olawe Ohana were one of the parties who were consulted in the drafting of that legislature to assure that when Kaho'olawe was returned to the State of Hawai'i from the U.S. Navy that the island would be held as a trust by the State of Hawai'i as part of the ceded public lands trust but would be turned over to sovereign Hawaiian entity one that is recognized and established and recognized by the State and federal government.

And, so our role in the Kaho'olawe isle reserve commission is to assure that the clean up and the policies that are set and the vision that's set for land use on Kaho'olawe is with the idea that this will eventually be returned to the Native Hawaiian nation.

Q. Okay, in your study of the rural communities the kipuka that you were talking about, did you also study subsistent life style?

A. Yes, I did.

Q. And, what—what does that entail for Native Hawaiians?

A. Well, subsistence is the growing of food or the gathering or fishing of natural resources to provide for the needs of your family, extended family or neighbors in community of neighbors but it's not for sale. And it's not as if Hawaiian communities are completely subsistent because many people have jobs and work and use the wages to provide for their families. But there's a strong supplementing of their incomes from subsistence fishing, gathering, hunting.

And, I was involved in a study that was done on subsistence practices on the island of Moloka'i. And, we did a sample survey, a random sample survey, a telephone survey, of the whole island of Moloka'i. And, we

found from that survey that across the island people said that they got about 28 percent of their food from subsistence activities be it gathering, fishing, somebody sharing with them something that had been grown or gathered. And, that—And, then for Native Hawaiian respondents it was 38 percent of their diet came from fish from subsidies.

So, on Moloka'i, for example, subsistence plays therefore a very important part of the livelihood of the people. It's not the only livelihood but it is certainly a very substantial part of the livelihood of Native Hawaiian people.

Q. So, it is a subsistent lifestyle traditional way of life for a Native Hawaiian?

A. Yes, it is. And, that's where I found the connection between the persistence of Hawaiian custom belief and practice in these rural communities that are still living by subsistence activities that to be successful and to really be able to provide for your families from subsistent activities, you need to have the knowledge of, you know, when to go out and gather, you know, when the fish will be ready to be gather, what kind of fish frequent which areas and, you know, how to best plant the taro in terms of by the moon phases and in harmony with the seasonal changes.

You know, the people who are fishermen on Moloka'i can survey an area by looking at the kind of limu that's growing they know what kind of fish will feed there and they know when those fish spawn and therefore you know you shouldn't be harvesting them and different fish have different spawning seasons so you gather certain fish one time of the year and another fish at another time of the year to allow them to go through their whole reproductive cycle successfully.

So, there's so much traditional knowledge that has passed on from one generation to the next that enables them to be successful in subsistent activities that's the relationship between subsistence and cultural and spiritual belief.

Q. So how did Hawaiians pass their knowledge of the land to down to a child?

A. By taking—the older generation would take the younger generation with them out in their fishing hunting and largely expect them to observe and watch carefully and understand and learn those practices and customs. If they were fishermen, they would go out and be the bag boy for the uncle or their father and just watch and be quiet and observe. And, as they mature, they would be able to go out on their own fishing expeditions and apply what they had observed and learned from their uncles or fathers or grandfathers.

Q. What role does place names play in knowledge of land?

A. The, as I say, the place names were given to identify the features and characteristics of the land. And, so if you can understand the place name, then you know what kind of resources might be there. I say might because sometimes it can be confusing. I told a story on Moloka'i you have kuahiwi pu'e which means the little hills that you grow sweet potatoes in so they thought oh, it's good land to grow sweet potatoes in. When they went to clear it, they found a lot of little stones that look like sweet potatoes. You have to know what the interpretation is.

But, you know, Puakauai on Kaho'olawe the 'Iwa the frigate birds. They are –The are most—if you know the translation and the story behind it, then you

know what kind of resources are there in the land to provide for you and to respect.

Q. What role do chants play in Hawaiian knowledge of the land?

A. Many of the chants are describing also the features of the land and the uses that traditionally were made and how to go out and gather the land what is the protocol to ask permission to gather those particular resources. So, the chants are very valuable in terms of the broad—the breath of understanding about the land and natural resources.

And, I was just doing a study of Makua reading a study of Makua and there's a translation of a chant from the Koko newspaper Pele Hiaaka was not included in the Emerson translation on Pele Hiiaka. Hiiaka this whole description of springs that are out in the ocean that are welling up in the ocean. And, then later there are interviews conducted in the fifties, 1950's by Marion Kelly and the kupuna are speaking of these same springs that were in the ocean well up in the ocean were sources of them for fresh water.

So, the chants do contain a lot of information about the resources that were there the springs and different kind of plants that enable the people to subsist the land.

Q. Who is Mr. Emerson for everybody else's edification?

A. Oh, he was ethnographer who did a lot of translations of chants unpublished literature and also the Pele Hiiaka story legend saga.

Q. Okay. I'm going to ask you to take a look at Exhibit 345, 162 and 354 and those are various pieces of legislature.

THE COURT: Would you like to work off of the exhibits up there or the originals?

Q. I—I gave her the clerk's copies. She have—it's 345, 162 and 354. And, judge, 345 are the judicial notice of fact. And so all the different laws that are included in that. And then 162 is actually the Hawaiian Homeownership Homelands Act 2000 taxed by Congress in December of 2000.

So then do you have 354 as well the legislature passed in 1993 in Hawai'i?

540. Which one is that?

It's 540.

THE COURT: Go off the record for a second. (Discussion off the record.)

Q. Okay, did you—did you work on the native Hawaiian Health Care Improvement Act 1982?

A. Yes, I did.

Q. And what did you do?

A. Drafts of the Health Care Reactivation was sent for me to review and I was allowed to make editing suggestions and to submit additional findings of fact for the bill.

Q. Okay. And did you check the facts in the bill for historical accuracy?

A. Yes, I did.

Q. And what was your opinion of the facts in the bill?

A. Well, the final findings of fact were accurate.

Q. Okay. Did you have an opportunity to work on the Joint Resolution to acknowledge the hundredth an-

niversary January 17, 1893, overthrow of the Kingdom of Hawai'i?

A. Yes, I did.

Q. What did do you in your review of that legislature?

A. Copies of the draft were given to me to review for historical accuracy and cultural appropriateness. And, again, I was allowed to make editing suggestions and to also suggest language changes.

Q. And did you—were you—did you have an opportunity to review the facts reported in the house legislature?

A. Yes, I have.

Q. Did you find them to be historically accurate?

A. Yes, they are.

Q. And, what about other findings legislature related to health of Hawaiian native people in relationship to the land, did you also review those?

A. Yes, I did.

Q. And—now, were you the author—did you find them to be accurate, I'm sorry?

A. Yes. I—the finding relating to Native Hawaiian health reliance of the Native Hawaiian health upon relationship with the land is actually based on a report that was done by Native Hawaiian consortium and the final report was called ['Ai a a mo]. In there they document in the mental health portion the importance of sustaining the relationship within Native Hawaiians sustaining relationship to the land to maintain good mental and physical health.

Q. And so with the finding of that report put college that were you saying?

A. Yes. I think the finding statement with regard to that was based on that study.

Q. And, do you know how the—the health report that you're referring to was put together?

A. The [Ae o la ma] Study.

Q. Yes.

A. There were health professionals in different fields and they each met. And, I believe they had some community consultation. And, then they had a meeting to develop the final drafts. And, it went through different versions. And, then, finally it was reported and submitted formally. This was to service the foundation for the passage of the health—the original Hawaiian Health Care Act. And, then that finding continued you know to be part of the findings and the re-authorization of the Health Care Act.

Q. So, in addition to those two statutes, did you have any direct input into any other of the federal statutes except we're not going to talk about the Akaka legislation right now. So, other than that, were there any other federal statutes you had prior to the passage and the same opportunity to review for historical accuracy?

A. No.

Q. Okay. I asked you to take a look at Exhibit 345 which has a number of findings in it all the way, I guess, to number 52. And, did you have an opportunity to review all the facts that were reported in—that are listed in Exhibit 345?

A. Yes, I have.

Q. And did you find them to be historically accurate?

A. Yes, they are historically accurate.

Q. Did you find them to be culturally correct as well?

A. Yes, they're also culturally appropriate.

Q. Okay. Could you take a look at Exhibit Number 162.

A. Yes.

Q. That is the—Title 2 which may be cited Hawaiian Homelands Homeownership Act 2000 Number 1—Congress?

A. Yes.

Q. Did you have a chance to look at this act in this bill?

A. Yes, I did. Yes, I did, in this law.

Q. And, did you determine if they were historically accurate?

A. Yes, they are historically accurate.

Q. And did you determine them to be culturally correct?

A. And they are culturally correct as well.

Q. And, there's actually two State Statutes which is Act 32 1997 Legislature and Act 359 from the 1993 Legislature. Did you have any in—direct input into the facts of those—those pieces of legislature?

A. Not the 1993, no. Is there—what was the second one?

Q. The second one was 1997. Actually, let me give you my—the trial Exhibit 12 and 6. You can take a look at them. Okay, 6 and 8. I'm sorry. Okay. So, I guess, start with number—trial Exhibit Number 6.

A. Yes.

Q. Okay. That's the 1993 bill. And, you stated you did not have input into the drafting of that; is that right?

A. No, I didn't have any, 1993, no, I didn't have any input in those.

Q. Okay. But you have reviewed the facts for historical accuracy?

A. Yes.

Q. Cultural appropriateness?

A. Yes, I have.

Q. What was your finding?

A. That it's historically accurate in terms of appropriateness.

Q. Let's take a look at exhibit 8.

A. Yes.

Q. Did you have any input into drafting that legislation prior to its passage?

A. This is for the Office of Hawaiian Affairs. No, I did not.

Q. Did—did you have a chance to review the facts and did you make a determination as to whether they were historically accurate, culturally—

A. Yes, I find them to be historically accurate and culturally correct—appropriate, sorry.

Q. Thank you. Okay. Do you have exhibit 548 there?

A. Yes, I do.

Q. Are you—are you familiar with this state law and did you have any input into the drafting of this particular bill?

A. I'm familiar with it, but, no, I didn't have input in the drafting of it.

Q. Did you make any findings though? Reviewed it?

A. Yes, I reviewed it and it's historically accurate and culturally appropriate.

Q. Okay. Now, let's turn to the Akaka Legislation. And, that is—excuse me. Let's turn first to Mauka to Makai Report, Department of Interior Justice, Exhibit 71. Are you familiar with that—are you familiar with that report?

A. Yes, I am.

Q. And did you have any input into the drafting of that report?

A. Yes, I did.

Q. And what was your input?

A. Well, as it happened I was in Washington D. C. doing a scholar residence.

Q. Was it the Smithsonian?

A. Yes, the Smithsonian residence program when this was being drafted. And I was asked to review it again for historical accuracy and culturally—cultural appropriateness.

Actually, it was brought in to meetings to review it and provide additional findings and documents to cite for the findings in this report.

Q. Okay. And, so were you able to make revisions, if appropriate?

A. I was able to make suggestions for editing.

Q. And, now, that the final is out, you had a chance to review it for historical accuracy and cultural appropriateness?

A. Yes, I have.

Q. And, what is your finding?

A. I find it is historically accurate and culturally appropriate.

Q. Okay, let's take a look then at the Akaka Legislature which is the—the Bill is Number 27 and the Committee Report is Number 28.

Have you—have you been afforded the opportunity of providing input into the drafting of the Akaka Bill?

A. Not directly but I did provide testimony in support of the Bill before. I haven't provided testimony for the 2001 version. But, when the hearings were held in August 2000, I testified in support provided additional support for the findings to bolster the findings that were in the—in the Bill.

Q. And, so, are the findings in the current version of the Bill the same as the ones for before?

A. No, I think it got expanded. But, there—there—they are historically accurate and culturally appropriate.

Q. Okay. How about the Committee Report, which is Exhibit Number 28, did you have an opportunity to have any input into the Committee Report?

A. No, I did not have any input into the Committee Report.

Q. Did you have an opportunity to review it?

A. Yes, I reviewed it and found it to be historically accurate and culturally appropriate.

Q. Okay. Okay. Next, I'd like to move to Exhibits 10 and 11 which are Hawai'i Sovereignty Election Council and Hawaiian Sovereignty Advisory Report.

Okay, let's look at Exhibit 10 first, since that is the earlier report.

A. Yes.

Q. Were you a member of the Hawaiian Sovereignty Advisory Commission?

A. Yes, I was.

Q. And, what—what did the Hawaiian Sovereignty Advisory Commission do?

A. Legislature asked us to propose a plebiscite question for Native Hawaiians to vote upon leaning toward development of organic documents for a Native Hawaiian government. And, we conducted hearings on all of the major islands to get input from the Native Hawaiian community on holding plebiscite and what would be the appropriate language for such a plebiscite.

And, we were also asked to propose a convention and a scheme for apportionment of delegates who will be elected to a convention to draft such an organic document.

Q. Who—who appointed you?

A. We were appointed by governor John Waihee.

Q. And how was funding obtained?

A. Funding was from the Hawai'i State legislature.

Q. Okay. And, then did you conduct hearings?

A. We conducted meetings on every island and most—most major districts on every island.

Q. And, approximately how many meetings did you have, if you can recall?

A. Oh, about ten. At least ten.

Q. Okay. Could you take a look at page 28. Were these the recommendations of the commission?

A. Yes, they are the recommendations of the commission.

Q. And, could you summarize for us what the major recommendations were.

A. Well, there was to be the plebiscite question that we devised was shall the Hawaiian people elect delegates to propose the Native Hawaiian government. And, then, if that was to be approved, then, we were recommending that a convention be held. And, we had a scheme for—a time table for the election of delegates to a convention and a convening of convention and its ratification.

And, we also had an apportionment scheme for 127 delegates to attend. And, there were some other—that section we had some other transitional recommendations.

There was a lot of concern that the State not deplete the ceded public lands trust until the Native Hawaiian government could be established. And, so there was, you know, strong—I can't find in here. There was a recommendation regarding moratorium on sales, exchanges, and the sale of any ceded lands that arose from the process of the holding—conducting the meetings and hearings.

Q. Why don't you take a look at page 26.

A. 26.

Q. Do you have the—do you have the correct report? Are you looking at 10?

A. 26. Sorry. Oh, yes. Here. Yes.

The Hawai'i community on each island has almost unanimously called for a measure to ensure that Hawaiian national trust lands, the Hawaiian home lands and the ceded public trust lands not be decreased or misused.

The community does not want to get involved with a lengthy process to restore formal recognition of a Hawai'i Sovereign nation and end up without a land base.

The community seeks a good faith gesture from the State government to protect the primary land base of the Hawaiian nation, the ceded public lands trust and Hawaiian home lands.

While there is no consensus on the commission how to address this concern, there is general agreement that it has to be addressed.

Q. I'm sorry.

A. Ask for moratorium.

Q. Okay. And, could you take a look at—so, do you agree with the report that the Hawaiian community on each island has almost unanimously called for a moratorium?

A. Oh, yes. This was the outstanding issue. And it was a very clear mandate from the communities that we—as we went to the islands.

THE COURT: Miss Broder, we'll take a ten minute stretch at this time.

MS. BRODER: Yes.

THE COURT: All right, we'll take a ten minute recess.

Thank you.

(Recess taken and reconvened at 2:24 P.M.)

Q. We were looking at the final report of the Hawaiian Sovereignty Advisory Commission February 18, 1994, Exhibit 10.

A. Yes.

Q. Take a look at page 35.

A. Yes.

Q. That between 35 and 38 appears to be historical findings of Hawaiian Sovereignty Advisory Commission; is that correct?

A. Yes.

Q. And, who wrote these?

A. Well, I did the first draft. And then everyone on the commission reviewed it and edited it.

Q. And who did the final draft?

A. Well, I guess, I incorporated all of the changes but the staff then did the final putting together the whole report.

Q. Did you have an opportunity to review the findings of the Hawaiian Sovereignty Advisory Commission?

A. Yes, I did.

Q. And what did you find?

A. I found it to be historically accurate and culturally appropriate.

Q. Okay. Let's take a look at Exhibit 11, which is the Hawaiian Sovereignty Elections Council December 19, 1996 report.

A. Yes.

Q. And were you a member of the Hawaii Sovereignty Election Council as well?

A. Yes, I was.

Q. And, how did it come about that the—that there was a second council of the Hawaiian Sovereignty Advisory Commission?

A. Well, the role of the Advisory Commission was to advise legislature on how to conduct an election. And there—actually, the original proposal of the Advisory Council was to hold an election for an elections council that it conduct such election.

A lot of the concern when we went out to the community were that we had been appointed by the governor.

But then when we held a meeting with Hawaiian Native organizations and presented our draft of report

they felt very strongly we should continue to serve as the elections council rather and to hold an election before proceeding to actually having a Native Hawaiian vote.

And, so, the—the bill that was written to set up the Hawai'i Sovereignty Elections Council said that the Hawai'i Sovereignty Advisory Council would then transform into the Hawaiian Sovereignty Elections Council.

Q. Okay. And, then did you again conduct meetings on all the islands?

A. We conducted meetings on all the islands to present our—our recommendations.

Q. And, did you—then when you prepared this final report, did you incorporate the recommendations that you had received from the people?

A. We tried to address all of their concerns and to incorporate those that we felt were appropriate.

Q. Okay. During the break you were informing me that you were involved in having input into another federal statute other than ones I had already mentioned earlier in your testimony. What—what statute was that?

A. Yes, I know you had asked me and I said no. And, then when I looked at one of the other reports I saw that there was the Native American Grave Repatriation Act. And, I did have an opportunity to review that—the draft of that Act as well and to provide input.

Q. Okay. Then, I also want to take you back to your Ph.D thesis which I believe is Exhibit 19. And, I'd like to draw your attention to page 38.

A. Yes.

Q. I was wondering if you could start with the second paragraph and read that to us and inform us as to how this relates to the Equality Resolution. Actually, read the second and third sentences.

A. Second and third sentences.

Q. Of the first full paragraph.

A. The new—The new Equality Resolution affected a transaction between the Republic of Hawai'i and the United States Government. The Native Hawaiian people never directly relinquished their claims to sovereignty as a people or over their national lands to the United States either through a monarchy or through a plebiscite or referendum.

Q. So, is this the identical language that is in the Apology Resolution?

A. Yes.

Q. Was that language taken from your Ph.D thesis?

A. Yes, it was.

Q. Okay.

So, have you had an opportunity to do work on recognition of the right of self determination, self governing?

A. Yes, I have.

Q. Okay. And, what work have you done?

A. Well, I was a member of the Hawai'i Sovereignty Advisory Commission, Hawaiian Sovereignty Elections Council which was laying foundation for a self-government for Native Hawaiians.

And, in our work—my work with the Protect Kaho'olawe Ohana we have always sought to have that be a sovereign claim for Native Hawaiians and we did succeed with the Hawai'i State legislature to in the law state that Kaho'olawe would be turned over to a Sovereign Hawaiian Entity when it was reestablished.

Q. By the way, was your work with the Sovereignty Hawai'i Advisory Commission submitted to the legislature?

A. Yes, they were.

Q. And, was that—was that part of the requirement in the process?

A. Yes, it was.

Q. What about—back to my question about steps toward recognition of the rights of self determination, right to self-government, what about your work in that area Micronesia?

A. Yes, I was part of the soon to be for the Pacific Concerns Research Center which was working for a nuclear free independent Pacific. And, so, we worked with a number of groups in the Marshall Islands as well as in Palau who had worked through their compact of free association with the United States as well as groups in Tahiti who were seeking recognition and the democrat movement in Tonga.

Q. And have you written in this area as well?

A. I haven't published anything in that area, no.

Q. Okay. Well, in regard to Native Hawaiian, do you—is it your—do you have an opinion as to whether or not there have been any steps towards recognition of the right of self determination and self government?

A. Well, yes. I—I—as a result of my research at the national archives during my sabbatical at the Smithsonian, I—in researching all the documents for the Admission Act and then comparing U.S. policy with that for Native Americans, I've written an article which I'm seeking to get published. And, in the manuscript what I come to the conclusion is that the—because of U.S. policy actually has very consistently recognized a special trust relationship for Native Hawaiians but there's also the recognition that it needs to have a special act of Congress because the Native American Reorganization Act does not include Native Americans out of the 48 states. And, so, like the Native Alaskans, the Native Hawaiians need a special Act of Congress.

And, the first step toward that recognition was the passage of the Apology Law, Public Law 103-150. And, in that law reconciliation process is called for.

And, so, the second step was the—were the hearings conducted by the Department of Justice and Department of Interior, and, the report that was issued from Mauka to Makai River of Justice Must Flow. And, that is—and, the findings the action recommendations in there is the second step toward recognition of Hawaiian self determination and establishment of self governments. And, the report makes that recommendation.

And, so, the third step is the passage of the Akaka Bill which will grant formal recognition the right of Native Hawaiians to self government and self determination.

Q. How does this compare with the process in Micronesia?

A. Well, the process in Micronesia, the United States dealt with Micronesia as a nation, an independent nation. And, in that case the people elected representatives to serve as a negotiating team on behalf of the Marshall Islands. And, the same thing happened in Palau.

And, then the negotiators sat down with the U.S. negotiators team the Department of Interior Affairs and they in turn negotiated what would be the term of the compact of the association that would be the governing document. And, that was submitted to the electorate to approve or disapprove.

And, in the case of Palau, it took twelve drafts to get approved. But, in the Marshall Islands it was more readily approved because it didn't have—it wasn't in conflict with the internal autonomy governing policies and the people themselves.

Q. Okay. Could you explain to us how one gets a Smithsonian Scholarship fellowship.

A. Oh, well this is a new program. It was a scholar residence program—

Q. Sorry.

A. —that was started by the Asian Pacific American Studies Program. And, you need to apply to the Asian Pacific American Studies Program to be there. They would provide an office space and certain—and transportation resources.

And, it's a chance for you to take the time to do your own independent research and to also work with the Smithsonian Institution the curators of different collections.

Q. Would—Did that give you access to original materials that would otherwise not have been available to you?

A. Yes. The Smithsonian Institution gave me access to their libraries and their manuscripts. And, it made it much easier to work in the national archives as well.

Q. Well, I guess my question, does that give you access to original materials that wouldn't otherwise be available to you rather than secondary source materials?

A. Well, the national archives is available to everyone. But, the original resource materials in the Smithsonian were made more readily available to me because I was affiliated with the Smithsonian Institution.

MS. BRODER: Thank you, Professor. No other questions.

THE COURT: Mr. Meheula, any questions?

MR. MEHEULA: No questions, Your Honor.

THE COURT: Mr. Komeiji.

MR.- KOMEIJI: Very brief—

THE COURT: Okay.

MR. KOMEIJI:—Examination.

CROSS EXAMINATION

BY MR. KOMEIJI:

Q. Doctor McGregor,—

A. Yes.

Q. —we know each other for some time. If you call me Mr. Komeiji, I think my dad is here or something.

Doctor McGregor, you agree that while the monarchy held the ceded lands, the public lands that the monarchy alienated or sold some of those lands to third parties?

A. The monarchy sold some of the government lands to third parties.

Q. For example, Princess Keliiokulani sold about 40,000 acres to Mr. Spreckles?

A. Well, now, that's a little more complicated. The—Ruth Keliiokulani did not have a valid claim it was found to the Crown lands although she had made an arrangement—

Q. Uh-huh.

A. —with Mr. Spreckles that should she win her claim at the Hawai'i supreme court that she would sell him half of her interest. And, she received the money in advance.

But when the supreme court ruled that she could not inherit the lands because they belonged to the institution, the monarchy, then Carl Spreckles took his claim to the supreme court and the legislature. And, they, with the support of King Kalakaua, agreed to alienate 24,000 acres on Maui to Carl Spreckles.

Q. But the point is, Doctor McGregor, that although the Hawaiians have a special relationship to the lands, the monarchy in the past has sold some of those lands, correct?

A. The monarchy has sold the lands. And the monarchy is a very—it's—it's both a Western and a

Hawaiian institution. It's—it's not a completely Hawaiian institution because it is actually based on western frameworks of law and on the English system of law.

So, the monarchy is already beginning to accommodate to Western influence and is very much a Western institution that is trying to incorporate and hold on to elements of the Hawaiian.

Q. Right. But the people who are the monarchs aren't Native Hawaiians?

A. That's correct, yes.

Q. Now, do you agree that the recognition of the Hawaiian Nation, I'm talking about the Akaka Bill, the recognition of the Hawaiian Nation how ever it's ultimately formed is one that the United States has to recognize, correct?

A. Yes, that's correct.

Q. And something that must be done by Congress?

A. That is correct.

Q. And, must be agreed to by the President following Congress' approval?

A. Yes, that's correct.

Q. So, you would agree that the recognition of the Native Hawaiian Nation how ever it's ultimately constituted would be a political issue to be decided by the Congress and the President?

A. I guess I'm trying to understand—

Q. Sure.

A. —the Akaka Legislation the Akaka Legislation would need to be approved by the U.S. Congress and the President.

Q. Uh-huh.

A. But they would set up the mechanism for the recognition process. And then once the bill would be passed, the actual recognition, as I understand as its currently written, would come from the Department of Interior—

Q. Right. But it would—

A. —go through that—

Q. I'm—

A. —elaborate process.

Q. I'm sorry. I misspoke. The government would still have to recognize the ultimate governing body that the Hawaiians create?

A. That's correct.

Q. Now, you agree that currently it is your position that the Kingdom of Hawai'i continues to exist?

A. Uh could you state that again, please.

Q. Sure. It is your position that the Kingdom of Hawai'i continues to exist?

A. I believe that the Nation of Hawai'i continues to exist.

Q. But you also agree that there is no formal government by which this nation can exercise power?

A. There's no government to which to exercise that sovereignty, yes, that's correct.

Q. And, part of this recognition process and the Akaka Bill is to form that government?

A. Yes, that's correct.

Q. And, in fact, the Hawai'i Sovereignty Advisory Commission that was one of the first steps towards working towards the formation of this government?

A. Yes, that's correct.

Q. Now, if we turn to page 30.

A. Of which document?

Q. Exhibit 10, which is the Hawaiian Sovereignty Advisory Commission Final Report.

A. Which page again, please?

Q. Page 30.

A. Yes.

Q. Now, this report was—the final report was issued in February 1994, correct?

THE COURT: What exhibit was this again?

Q. Exhibit 10.

THE COURT: Thank you.

A. February 1994, yes.

Q. Now, if you look at the time table, there's a time table on page 30 that talks about election of candidates as well as establishing a convention and ratification of work of convention by the Hawaiian Community.

You see that? I'm just kind of paraphrasing the time table on page 30.

A. Yes. Yes.

Q. Now, the time table back in 1994 was for the ratification of the work of the convention by the Hawaiian Community to be concluded by August 1996, correct?

A. Yes, that's correct.

Q. And to date, to date as of November 20th, 2001, that has not yet occurred, correct?

A. Only the plebiscite has been held.

Q. Right.

A. I'm sorry. There—There—out of this process there was another organization that formed and did hold a convention.

Q. —Hawai'i ?

A. Yes. Yeah. So, in a sense there's been a follow-up and a convention. But the ratification by the Hawaiian Community has not occurred.

Q. Maybe what we can do is turn to Exhibit 11 which is the Hawaiian Sovereignty Elections Council Report.

A. Page 11?

Q. Exhibit 11.

A. Okay. Yes.

Q. That report was completed in December of 1996, correct?

A. Yes.

Q. Now, if we turn to page 56.

A. Yes.

Q. Now, we go through these steps there's a time line. Step one, Native Hawaiian vote. You see that?

A. Yes.

Q. The Native Hawaiian vote did take place, correct, plebiscite?

A. Yes, correct.

Q. And of the 780,000 ballots that were sent out about 38 percent returned on that vote?

A. Yes. Correct.

Q. And, about 70 percent or 75 percent or around that area said that you should go forward basically?

A. 78 percent.

Q. Okay. Now, the Hawai'i Sovereignty Elections Council concluded—I'm sorry.

A. I'm sorry, 73 percent. You were right. Yes.

Q. Now, He Hawai'i kind of took over the Native Hawaiian Elections Council, correct? (?)

A. The—because there was no funding for the continued work of the Elections Council then we had to sunset and then some of the members of the Elections Council set up He Hawai'i as the way to continue the work try to raise funds independent of the government to continue the process.

Q. At—Under this time table it was anticipated that ratification of whatever organic documents would have occurred by March of 1999, correct?

A. That's correct.

Q. To date as of November 20th, 2001, there has not been a final draft of any organic document, correct, by He Hawai'i Sovereignty Council or anyone associated with those two organizations?

A. I believe He Hawai'i has some documents. I haven't seen them. It's accurate to say they have not been ratified by the general Native Hawaiian Electorate.

Q. I guess the question I want to ask you, are you aware of a final—I know that they are working on it—have they issued a final draft that you're aware of comment of the Native Hawaiian Community organic document?

A. Not that I'm aware of, no.

Q. Now, the organic document, turn back to page 54, the organic document that the Native Hawaiian Sovereignty Elections Council anticipated created were to cover much of the topics listed on page 54, correct?

A. Yes, that's correct.

Q. So it was almost this governing organic document that we talked about would be in the nature of some type of Constitution or something like that?

A. Yes, that was what we envisioned.

Q. I'm sorry, I'm interrupting you.

And, these—these would be some of the issues that the taxes, law, how you would make law, how you would manage funds, how you administer justice, control domestic relations, manage lands and natural resources, regulate council defense sovereignty, human rights, conducting human relations and monitoring system, those would all be part of whatever this organic—your suggestion—council's suggestion what matters that should be taken up by the creators of this organic document, correct?

A. That was the suggestion, yes.

Q. Now, if you turn to page 58, there's a projected budget for this process, correct?

A. Yes.

Q. And the projected budget was about eight million dollars?

A. Yes.

Q. Of that amount do you know how much that amount was actually raised?

A. No, I don't know.

Q. You'd agree that the amount that was actually raised was far less than eight million dollars?

A. Yes.

Q. Do you know if they raised a million dollars?

A. I don't know.

Q. Now, based upon your knowledge today, you're not able to say whether this ratification vote for whatever organic documents when that will take place, correct?

A. No, I wouldn't be able to set a date on that.

Q. Now, under the Akaka Bill and the committee report that you talked about earlier,—

A. Yes.

Q. —it's envisioned that once the bill passes, that Native Hawaiians or the Hawaiians would form a governing entity somewhat along the lines that the Native Hawaiian Sovereignty Elections Council was proposing, correct?

A. Yes.

Q. That there would be some sort of organic documents and then there would be a referendum to approve those documents and that government would then meet with the United States in terms of pursuing further reparations, correct?

A. I think that the way the Akaka Bill is currently worded it seems even possible for existing organization to seek recognition as I read the bill.

Q. But there is no existing organization now that you believe can exercise the powers or the sovereign powers of the Nation of Hawai'i, correct? We just talked about that earlier.

A. I—I'm not in a position to really say because as I understand—as I've understood there are members say, of the Hawaiian Homestead Communities who might seek to get recognition of a form initially to get autonomous control of the Hawaiian Homestead Lands. I don't—I mean I know that they have introduced legislation at the state level to enable them to accomplish this. So, there are many forms in which the recognition would take place.

So, if there is, for example, a federated model rather than one Nation, but, different, let's say, different islands or in the case Hawaiian Homesteaders might seek recognition and if the federal government would allow that, it's conceivable under the way that the bill is currently drafted because as compared to the first draft which did prescribe a process and a time table, the second leaves it open.

And, I have understood, you know, I know that there are groups that are contemplating if it might be possible to get recognition.

Q. I guess the point though, Doctor McGregor, that is speculation as to what ultimately would happen—speculation at this point as to what would happen in terms of what entity gets recognized as the sovereignty government for the Nation of Hawai'i.

A. I don't know. I don't like the word speculation. But it's uncertain at this time—

Q. Okay.

A. —who would step forward and attempt to seek that recognition and what process would best work. And, I know on the other hand too that there are groups meeting weekly to be ready to respond as soon as Akaka Legislation is passed.

And, I think the Office of Hawaiian Affairs has also conducted a number of studies and is prepared to step in to enable this process to move forward as well.

Q. You agree that the reparations process once this entity is recognized would be one of negotiations, correct, or, would be one of negotiations between the United States and this recognized entity?

A. Yes.

Q. And, in a negotiation you have to have both sides agree to whatever is going to happen, correct?

A. Yes.

Q. So, although, you testified earlier that there may have been a continuum where initially money may have satisfied certain Hawaiians in terms of reparations that it may now come to a point that land needs to be returned from the Hawaiian standpoint?

A. Yes.

Q. You would agree though that to have that occur, you would need to—the United States government and/or the State of Hawai'i would have to agree to that for a final Reparations Bill to be completed?

A. Yes, that's correct.

Q. And, at this point you—I'm going to use the word speculation, again—you would be speculating as to what the position of the United States government and/or the State of Hawai'i would be as to whether or not

A. At this time not aware of any.

MR. KOMEIJI: Thank you.

THE COURT: Any Redirect?

MS. BRODER: I have a couple questions.

REDIRECT EXAMINATION

BY MS. BRODER:

Q. Professor McGregor, Mr. Komeiji referred to the fact that you believe the Nation of Hawai'i continues to exist. Could you explain to us why you make that statement what does the opinion mean.

A. Well, a nation is a constituted community of people of common language, common culture, common economic life and national land base. And, I believe that the Native Hawaiian people continue to have all of those qualities that make us—make Native Hawaiian people a nation.

So, in that regard, we are a nation. Although, as I said, we don't have a government for which to exercise our sovereignty.

Q. And you don't have a land base?

A. Well, we—we believe we have a land base. We have a natural land base which is comprised of the original Crown government lands.

Q. And, those—

A. And, it doesn't just consist of existing land base ceded lands include Hawaiian Homelands. And, there were lands that were alienated in the period that the Republic of Hawai'i held the lands and there were lands that were inappropriately alienated by the federal government when it held the land Territorial government. And those are all lands to which Native Hawaiians have just claims. We're not just looking at the existing land base but all of the original lands to trace what happened at each point to claim any repatriations for the lands inappropriately alienated either by the Republic or the territorial government.

Q. Okay. You indicated that approximately 23,000 people voted in direction in favor of establishing a sovereign nation, correct?

A. Yes, 23,300.

Q. Well, would it be possible for those 23,300 people who wish to form a nation governing doctrine, would it be possible for them to form a nation?

A. I believe it is possible under the Akaka legislation as it is drafted.

Q. Okay. Then you indicated that after (ASAP) it's appeared that Hawai'i continued work and other two groups working there weren't any further projects that were funding is, correct?

A. That government a state government cut funding to continue the process that had been initiated un-

der the Hawaiian Sovereignty Advisory Commission and Elections Commission.

Q. Did Hawaiian Sovereignty Election Council have problems with funding as well?

A. Yes, it did. Governor Cayetano withheld the funds and the Office of Hawaiian Affairs had to match the funds so that the election could be held.

MS. BRODER: Okay, I don't have any further questions.

THE COURT: Mr. Meheula.

MR. MEHEULA: No questions.

THE COURT: Mr. Komeiji.

MR. KOMEIJI: Nothing, Your Honor.

THE COURT: Thank you very much, Miss McGregor.

Miss Broder.

MS. BRODER: Your Honor, we're going to call Kali Watson.

MR. KOMEIJI: Wait. Wait. Nobody said they're going to call Kali Watson.

THE COURT: Okay. We had, I guess, we were anticipating Professor McGregor.

MS. BRODER: I was anticipating the whole afternoon.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

No. 25570

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Plaintiffs-Appellants,
v.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, *et al.*,
Defendants-Appellees.

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STATE OF HAWAII]

PLAINTIFFS-APPELLANTS OFFICE OF HAWAIIAN AFFAIRS REPLY BRIEF

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PLAINTIFF-APPELLANT OFFICE OF HAWAIIAN AFFAIRS' REPLY BRIEF

I. INTRODUCTION.

On November 14, 1994, Plaintiff-Appellant OFFICE OF HAWAIIAN AFFAIRS ("OHA") filed an action in the First Circuit Court against Defendants-Appellees HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII ("HCDCH"), THE STATE OF HAWAI'I, and others ("State"), requesting an injunction barring the State's planned sale of Ceded Lands to developers on Maui and Hawai'i, until such time as Native Hawaiian claims to those lands are resolved through the political process. Record on Appeal, Volume I ("RA-1") at 1.

This is an appeal from a December 5, 2002, 106-page Opinion by First Circuit Court Judge Sabrina S. McKenna (and a January 31, 2003, HRCP Rule 54(b) Final Judgment as to Counts I and II), dismissing OHA's claims for injunctive relief. RA-XVI at 190.

On August 11, 2003, OHA filed its Opening Brief ("OB"), raising seven points of error. OB at 17-24. OHA challenged the trial court's rulings on political question, sovereign immunity, waiver, ripeness, breach of trust, estoppel, statute of limitations and laches. *Id.* OHA also questioned the court's adoption of an opinion by former Attorney General Margery Bronster, and its refusal to consider crucial testimony by former Attorney General and former OHA lawyer, Earl Anzai. *Id.*

Noting that 1996 and 1998 rulings by Circuit Court Judges Daniel Heely and Kevin S. C. Chang had al-

ready turned back identical challenges to this suit by the State, and the *de facto* injunction recognized by the State since OHA filed this action in 1994, OHA asked this Court to set aside the State's technical arguments, vacate Judge McKenna's December 5, 2002 Opinion, affirm the rulings of Judges Heely and Chang, and impose a moratorium on the transfer of Ceded Lands to developers until the claims of the Native Hawaiians to these lands are resolved.

On October 14, 2003, the State filed a consolidated Answering Brief ("AB") against the separate OBs of OHA and the individual Plaintiffs represented by William Meheula. Disregarding the precedent set by Judges Heely and Chang, ignoring the 1993 Apology Resolution and its findings of an illegal overthrow and transfer of lands, and acknowledging the *de facto* injunction in place since 1994, the State insists that this Court change the status quo, open the floodgates, and permit the State to begin selling Ceded Lands to developers on Maui and Hawai'i.

The State is wrong. This Honorable Court explained in *Office of Hawaiian Affairs v. State*, 96 Hawai'i 388, 401, 31 P.3d 901, 914 (2001), that the State of Hawai'i's obligation to Native Hawaiians is firmly rooted in the State Constitution, and this Court recognized the "right of native Hawaiians to benefit from the ceded lands trust." That opinion indicated that although the political branches of the State's government have the primary responsibility to resolve the claims of the Native Hawaiian people, this Court will act in appropriate circumstances to prevent the State of Hawaii from acting contrary to "the mandates of the constitution." *Id.*

The present case has been brought by OHA and individual Hawaiians to protect the lands held by the State in the Public Land Trust (also called the "Ceded Lands") so that the obligations owed to the Native Hawaiian people under Hawai'i's Constitution, federal law, state statutes, and international law can be fulfilled properly through the political process. The Appellants thus have made a modest[1] but very important request of Hawai'i's—judiciary to issue an injunction protecting the trust assets against dissipation while these political negotiations are underway. If Hawai'i's judiciary cannot assist Hawai'i's native people in this one limited respect, then the commitment of this Honorable Court to ensure that the State meets its Constitutional obligations to the Native Hawaiian people will have been rendered completely toothless.

The State's AB refuses to acknowledge the significance of the repeated recognition by the federal and state legislatures that the overthrow of the Kingdom of Hawai`i was illegal and in violation of international law, and that the Ceded Lands at issue in the present case were acquired by the United States "without the consent of or compensation to the Native Hawaiian people of Hawai`i or their sovereign government." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i,

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[1] On April 20, 1995, Former Director of DLNR Michael Wilson circulated instructions to the Land Management Department: "It is administration policy that ceded lands shall not be sold or traded in exchange for other lands. Any exceptions to this policy shall be approved by the Chairman." Trial Exhibit 13. Another former Director of DLNR Gil Algaran testified that during his tenure there were only a few fee simple sales of ceded lands—remnant pieces of land between 4,000 to 11,000 square feet. Trial Transcript, 11/21/01, pp. 102-104.

Pub. L. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution").[2] As the Circuit Court acknowledged in its December 5, 2002 Opinion, the findings in the Apology Resolution are "binding upon this court." OB, Appendix E at 26-27, *citing State* v. *Lorenzo*, 77 Hawai`i 219, 221, 883 P.2d 641, 643 (App. 1994). This Congressional recognition of illegality, and its accompanying call for a "reconciliation" through a process now underway,[3] has changed the legal landscape and restructured the rights and obligations of the State. Congress has explicitly "delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawai'i." OB, Appendix E at 29, *citing* Hawaiian Homelands Homeownership Act of 2000, Sec. 202(13), Pub. L. 106-568 (2000).[4] This Court should follow the path

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[2] According to Judge McKenna, the Hawai'i Legislature "characterized the 1993 Apology Law as an accurate recounting of 'the events of history relating to Hawai'i and Native Hawaiians,' and had called for a 'lasting reconciliation' and 'a comprehensive, just, and lasting resolution...' " OB, Appendix E at 32.

[3] *See infra* note 9.

[4] This same statement affirming the delegation of authority "to administer a portion of the Federal trust responsibility to the State of Hawai`i" is in the Hawaiian Homelands Homeownership Act of 2000, Sec. 202(13) and the 2002 Native Hawaiian Education Act, Sec. 7202(12)(D), Pub. L. 107-110 (Feb. 2, 2002). The State of Hawai'i's trust obligations to Native Hawaiians are particularly important because they stem from the Congressional enactment admitting Hawai`i to statehood. When Congress imposes trust responsibilities in statutes admitting territories into the Union as states, Article VI of the U.S. Constitution requires the states to defer to those admission enabling acts and to comply with the trust responsibilities. *See, e.g., The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867)(explaining that Kansas had accepted admission into the United States on the condition, articulated in the admitting statute, that the rights of Indians in Kansas remain unimpaired and that Congress would continue to have power to regulate Indian

taken in Alaska and New Zealand and many other communities and impose a moratorium on the sale or transfer of Ceded Lands in order to preserve the trust corpus until the reconciliation process between the government and the Native Hawaiian people is completed.

The recent enactment of the Office for Native Hawaiian Relations in the Consolidated Appropriations Act of 2004, Sec. 148, Pub. L. 108-185 (2004), is yet one more step in the journey toward reconciliation and its inextricably intertwined fundamental underpinnings - reparations of land and recognition of a native government. One of its statutory mandates and duties is to "continue the process of reconciliation with the Native Hawaiian people." *Id.* at 148.

II. The State's Sovereign Immunity Argument Fails To Address The Current Situation, Where One State Entity Is Bringing A Claim Against Another State Entity.

In Section IV(B)(l)(a) of its AB, at pages 16-18, the State provides a standard mantra claiming sovereign immunity, but its argument completely ignores the actual factual setting of the present case, where one state entity is bringing a claim against another. As OHA ex-

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affairs); *Ex Parte Charley Webb*, 225 U.S. 663 (1912)(*accord*, with regard to the admission of Oklahoma into the Union). In *Idaho v. United States*, 533 U.S. 262 (2001), the title was to disputed submerged lands to the Coeur-d'Alene Tribe, even though normally such lands would pass from the federal government to a state at the time of statehood, and the court ruled in favor of the tribe because of the importance of protecting native property and the presumption that anything not explicitly transferred by a native group remains as their property for their benefit. The *Idaho* case reaffirms the common canon that if statutes or presumptions point in conflicting directions, courts must interpret that conflicting law in favor of native claimants.

plained in its OB, this Court has previously adjudicated such claims and never ruled that sovereign immunity bars a claim brought in such a context. OB at 33, *citing, State ex rel. Bronster* v. *Yoshina*, 84 Hawai`i 179, 932 P.2d 316 (1997); *Board of Education* v. *Waihee*, 70 Hawai`i 253, 768 P.2d 1279 (1989); *Office of Hawaiian Affairs* v. *State*, 96 Hawai`i 388, 31 P.3d 901 (2001). For similar examples from other jurisdictions, *see County of Skamania* v. *State*, 685 P.2d 576, 579 (Wash. 1984)(adjudicating a claim brought by a county, the State Board of Education, and the University of Washington Board of Regents against the State of Washington); *State* v. *University of Alaska*, 624 P.2d 807 (Alaska 1981) (adjudicating a dispute between the State of Alaska and the University of Alaska); *State ex rel. Ebke* v. *Bd. of Educational Lands and Funds*, 47 N.W. 2d 520 (Neb. 1951)(adjudicating a claim brought by the State of Nebraska against a state agency).

The present claim is brought pursuant to *Ex Parte Young*, 209 U.S. 123 (1908), against state officials seeking to enjoin them prospectively from violating statutory and constitutional rights. At page 17 of its AB, the State erroneously argues that "plaintiffs' claim for injunctive and declaratory relief effectively deprives the State of control over public lands. The claim is the 'functional equivalent of a quiet title action.'" On the contrary, if the injunction sought by OHA is issued, the State will still retain the responsibility to control and manage the public lands as before, with the one exception that it cannot sell, transfer, or otherwise dispose of them. And, as in *Bush* v. *Watson*, 81 Hawai`i 474, 481, 918 P.2d 1130, 1137 (1996), where this Court denied a claim of sovereign immunity, "an injunction...would not render the State...liable to the contracting parties." The power to sell or transfer has never been viewed as

an essential element of a property right. A license to practice law, for instance, is a property right, even though lawyers cannot sell or transfer their rights to represent clients in courts of law. Similarly, the right of a tenured faculty member to maintain a university position is a property right, even though it cannot not be transferred to a younger colleague. *See also Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979), where the U.S. Supreme Court upheld a federal law banning the sale of eagle parts against a takings claim, explaining that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregation must be viewed in its entirety."

The State's reliance upon *Idaho* v. *Couer d'Alene Tribe*, 521 U.S. 261 (1997), is misplaced. AB at 17-18. If the injunction sought in the present case is issued, "substantially all benefits of ownership and control" *will not* "shift from the State" to OHA or to the Native Hawaiian people, as the State's alarmist language would have this Court believe. *Id.* The State will still manage these lands as trustee, as at present, but will be barred only from transferring any of the lands until the Native Hawaiian claims are addressed and resolved. The State's AB makes no attempt whatsoever to respond to the explanation in OHA's OB at page 32 that an examination *of Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999), makes it clear that the *Couer d'Alene Tribe* case is not applicable to the present dispute. *Id.* Language used by the Tenth Circuit in *Branson School District RE-82* v. *Romer*, 161 F.3d 619, 632-33 (10th Cir. 1998), is also applicable here: "the plaintiffs' requested relief cannot seriously be compared to a

quiet title action, in which all or substantially all ownership interests in the lands would be stripped from the state. The far more accurate analogy for the plaintiffs' requested relief is not a quiet title action, but rather the quasi-equitable action for a breach of trust."

The present case is thus similar to the claims brought in *Branson* and in *Napeahi* v. *Paty*, 921 F.2d 897, 899, 903 (9th Cir. 1990), *cert. denied*, 502 U.S. 901 (1991), both of which were efforts by beneficiaries to enforce a trust. In *Branson*, 161 F.3d at 633, the court quoted from *Restatement (Second) of Trusts*, sec. 199 (1959), for the proposition that "[t]he beneficiary of a trust can maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; (c) to compel the trustee to redress a breach of trust...."

III. The State's Arguments Regarding the Issuance of an Injunction Confuses the Power of Federal Courts to Enjoin State Agencies with the Power of State Courts to Issue Such an Injunction.

In its Section IV(A)("Standards for Injunctive Relief"), at pages 13-16 of its AB, the State relies heavily on federal appellate decisions that limit the authority of federal courts to issue injunctions to state and local agencies. *See, e.g., Rizzo* v. *Goode*, 423 U.S. 362 (1976)(criticizing the federal district court for issuing an intrusive injunction to a local law enforcement agency); *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996)(explaining that federal courts have a limited role in structuring state institutions, in a case involving a challenge to the Arizona prison system). These federalism concerns are irrelevant to the present proceeding, where OHA is asking the courts of the State of Hawai`i to issue an injunction to protect the rights of Native Hawaiians. Courts

are authorized to issue injunctions to plaintiffs who have established that their substantive claims are likely meritorious, that the balance of irreparable damage favors the issuance of an injunction, that the public interest favors the issuance of an injunction, and that they have no legal remedy through which they can protect their interests. *See, e.g., Life of the Land* v. *Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978); *Lake Michigan Federation* v. *U.S. Army Corps of Engineers*, 742 F. Supp. 441, 447 n. 5 (N.D. Ill. 1990).

In this case, OHA's exhibits and testimony have established the merits and legitimacy of the claims of the Native Hawaiian people to their fair share of the lands in the public land trust. *See, e.g., OB*, Appendix E at 28, explaining that the 1993 Apology Resolution "confirms the factual foundation for claims that previously had been asserted." The evidence in the record also demonstrates the irreparable harm that the Native Hawaiian people will suffer if any of the lands in this trust are sold, transferred, or otherwise alienated pending the resolution of these claims. Many important lands have already been lost from this trust. Appellants' (and the State's[5]) witnesses have demonstrated that the `Aina, or land, is of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being. 'Aina is a living and vital part of the Native Hawaiian cosmology, it is irreplaceable, and it has intrinsic value that cannot be matched by monetary

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[5] *See, e.g.*, Testimony of John Jubinsky 33:15-18:

> Q: So to Hawaiians, do you agree and admit that having just money instead of land is not the same thing?
>
> A: I agree. The 'Aina is very important to the Hawaiians, and I understand that.

payments. *See* Trial Testimonies of Professor Davianna MacGregor on 11/20/01, Pualani Kanahele on 11/28/01, Former OHA Trustee Hannah Springer on 11/21/01 and Affidavit of Linda Kawai'ono Delaney, Trial Exhibit 26; Affidavit of Noa Emmett Aluli, Trial Exhibit 60, "Without The Land We Are Nothing," by Noa Emmett Aluli, M.D., Trial Exhibit 65; *see also* Apology Resolution, "whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."

As the Tenth Circuit explained in *Branson School District RE-82* v. *Romer*, 161 F.3d 619, 637 (10th Cir. 1998), "a trustee must take steps to preserve the trust property from loss, damage or diminution in value." Because of the uniqueness of land to Native Hawaiians, a later money damage remedy would not be adequate to protect the interests of the Native Hawaiian people, and thus Appellants' remedies at law are not adequate to prevent irreparable harm. An injunction is necessary to preserve the status quo. The balance of hardships resulting from the issuance or nonissuance of injunctive relief tips sharply in favor of issuance of injunctive relief. The public interest also favors the issuance of an injunction in this case, because the injunction will protect the disputed trust corpus and is also likely to promote the ability of the parties to reach an early full and fair settlement.

The case of *American Telephone and Telegraph Company* v. *Winback and Conserve Program, Inc.*, 42 F.3d 1421 (3rd Cir. 1994), which the State relies upon at page 15 of its AB, would appear to be completely irrelevant to its position, because the court in that case reversed the district court's denial of a preliminary injunction and remanded for further proceedings, explaining that appellate courts have the authority to re-

view lower court rulings on injunctions to determine whether the lower court applied " 'an erroneous view of the applicable law.' " *Id.* at 1427 (*quoting from Apple Computer, Inc.* v. *Franklin Computer Corp.*, 714 F.2d 1240, 1242 (3d Cir. 1983), and *Donovan* v. *Bierwirth*, 680 F.2d 263, 269 (2d Cir. 1982)).

Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999), is also irrelevant, because the Supreme Court held there only that federal courts, in traditional disputes among commercial parties, should restrict their remedies to those authorized by Congress, and that a general creditor has no interest in the specific property of a debtor. In less traditional cases, federal and state courts have approved the issuance of injunctions to protect assets from being dissipated.[6] Furthermore, if one were to use the language used in the *Grupo Mexicano* case, the Native Hawaiians are not a "general creditor" with no interest in the specific property of the debtor. The Na-

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[6] *See, e.g., United States ex rel Rahman* v. *Oncology Associates*, 198 F.3d 489, 497 (4th Cir. 1999)(upholding, after the *Grupo Mexicano* decision, the power of a federal court to issue an injunction freezing assets, emphasizing that the power to award interim equitable relief expands when "the public interest is involved"); *Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1476-80 (9th Cir. 1994)(upholding the issuance of an injunction in a case seeking money damages where the Estate had engaged in a pattern of secreting or dissipating assets to avoid judgment); *Blundon* v. *Guy*, 53 F.2d 930 (D.C. Cir. 1931)(approving the issuance of a prejudgment injunction against the assets of a nonresident debtor); *Delaware River and Bay Authority* v. *York Hunter Const., Inc.*, 781 A.2d 1126, 1129 (N.J. Super. Ch. 2001)(issuing an injunction to prevent contractor from further dissipating funds earmarked for paying subcontractors on terminal project); *Teferi* v. *Dupont Plaza Associates*, 551 A.2d 477 (Md. App. 1989) (upholding the issuance of an *ex parte* interlocutory order preventing suspected embezzler from dissipating his asset).

tive Hawaiians are not seeking monetary damages but instead have a specific claim to the specific property found in the Public Land Trust, property that is unique and not fungible, and hence they stand in a dramatically different posture from a general creditor seeking funds from a debtor.

IV. The State's Arguments Asserting a Continuing Right to Sell or Transfer the Ceded Lands Fail to Acknowledge the Change in the Legal Landscape Brought about by the 1993 Federal Apology Resolution, the Corresponding State Enactments, and the Ongoing Reconciliation Process.

A. Attorney General Opinions Have No Binding Force on This Honorable Court.

Both the Circuit Court in its Opinion and the State in its AB rely heavily on Attorney General Opinion 95-3, issued July 17,1995, which concluded that the State has the power to sell or transfer the Ceded Lands. AB at 19, 32-33, 39, 68, OB, Appendix E at 82-91. OHA has explained in its OB, at pages 22 and 34-35, and explains further in the materials that follow, that this Opinion is incorrect in its analysis. But it should also be emphasized again that Attorney General Opinions have no force before this Honorable Court beyond whatever persuasive value they may have. Perhaps the best direct evidence to demonstrate that Attorney General Opinions have no binding force can be found in the recent position adopted by the Attorney General herself in the case of *State ex rel. Bronster v. Yoshina*, 84 Hawai`i 179, 932 P.2d 316 (1997), arguing that many years of previous Attorney General Opinions were incorrect.

B. Hawai'i's Ceded Lands Are Unique Because Congress Stated Clearly that Their Revenues Should Be Used "for the Betterment of the Conditions of Native Hawaiians."

At pages 19-22, the State's AB argues that lands transferred to other states upon admission have been sold despite the trust status of those lands, citing the early cases *of Alabama* v. *Schmidt*, 232 U.S. 168 (1914), and *Cooper* v. *Roberts*, 59 U.S. (18 How.) 173 (1855). But as the Tenth Circuit explained in *Branson School District RE-82* v. *Romer*, 161 F.3d 619, 633 (10th Cir. 1998), the later Congressional enactments admitting new states contained "more specific land grants" that created "fiduciary obligations on the part of states." The State ignores the situation in Alaska, which provides the appropriate analogy for Hawai'i's situation. Like Hawai'i's, Alaska's statehood act referred explicitly to native claims, and in Alaska a moratorium was established by federal officials, and enforced by federal courts, to protect the rights of the Alaska Natives until their claims were finally resolved by a federal statute. *See* OB at 41.

The State agrees with OHA that the Admission Act constitutes a "solemn agreement" or a "compact" between the federal government, the state government, and the Native Hawaiian people, AB at 25, but its view of the nature of the obligations under this agreement differs dramatically from that of OHA. The State claims that it would not violate the Admission Act if no revenues from Ceded Lands went to the Native Hawaiian people. *Id.*, *citing*, *Price* v. *Akaka*, 928 F.2d 824, 826 (9th Cir. 1990) (decided three years before the Apology Resolution was enacted). In light of the recognition by Congress that these lands were acquired after illegal conduct by the United States causing di-

rect injuries to Native Hawaiians, such a view is no longer tenable. The State's argument on page 26 of its AB that the "compact" in the Admission Act "is being changed without consent of Congress" is bizarre, because it was Congress itself that enacted the Apology Resolution and thus caused the change in the legal regime that governs these lands.

C. The Language In Hawai'i's Admission Act Must Be Read and Interpreted to Be Consistent with Relevant Subsequent Statutes, Such as the 1993 Apology Resolution.

The State argues at pages 22-23 of its AB that, because language in the Admission Act refers to the proceeds of sales and the promotion of farm and home ownership, it must inevitably follow that the State is authorized to sell the Ceded Lands. But this general language in the Admission Act must be interpreted in light of the very specific language in the 1993 Apology Resolution, which states that Ceded Lands were acquired by the federal government "without the consent of or compensation to" the Native Hawaiian people after the United States acted "illegally" and in violation of "international law" in providing the crucial and essential intervention that led to the "illegal overthrow" of the Kingdom of Hawai'i.[7] The State Legislature has repeatedly endorsed this view, recognizing that Native Hawaiians are indigenous peoples who have been denied their lands and that the overthrow of the Kingdom of Hawai`i violated international law, supporting the

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[7] The Apology Resolution explains that "*without the active support and intervention by the United States diplomatic and military representatives*, the [January 1893] insurrection against the Government of Queen Liliuokalani *would have failed* for lack of popular support and insufficient arms...." (emphasis added).

development of a Native Hawaiian nation, and beginning the process of allocating land to this new native nation. *See* OB at 36, citing, Act 359, 1993 Haw. Sess. Laws 1009; Act 329, 1997 Haw. Sess. Laws 956; H.R.S. Sec. 6K-9.

The State's AB argues that the Apology Resolution can be disregarded because Section 3 of that enactment says that it does not serve as a settlement of claims, and therefore the "bill did not create any substantive rights." AB at 44, *quoting, Rice* v. *Cayetano*, 941 F. Supp. 1529, 1546 n. 24 (D. Hawai'i 1996). But the failure of the Apology Resolution to complete the process of settling Native Hawaiian claims does not undercut its significance in recognizing the basis for these claims. The Apology Resolution acknowledges that the United States acted illegally and in violation of international law in participating in the overthrow of the Kingdom of Hawai'i, and it calls for a "reconciliation" process to address and resolve these claims. As the Circuit Court explained, the Apology Resolution "confirms the factual foundation for claims that previously had been asserted." OB, Appendix E at 28. Similarly, the U.S. District Court for the District of Hawai'i relied directly on the Apology Resolution for its conclusion that:

> On January 17, 1893, the United States overthrew the Kingdom of Hawai'i. A century later, Congress acknowledged that this overthrow was illegal, and that it deprived native Hawaiians of their right to self-determination. *See P.L. 103-50 (November 23, 1993)*, reprinted in 107 Stat. 1510 ("Apology Resolution").

Arakaki v. *Cayetano*, 198 F.Supp.2d 1165, 1170 (D.Hawaii, 2002).[8] Or, as an academic commentator has recently explained: "Congress has acknowledged and apologized for a litany of wrongs that includes the overthrow of an independent state and the usurpation of that state's public lands, as well as the decimation of a vibrant people and their culture." Casenote, *Constitutional Law—Voting Rights—Native Hawaiians—Ninth Circuit Invalidates Office of Hawaiian Affairs Trustee Requirement—Arakaki* v. *Hawai'i*, 314 F.3d 1091 (9th Cir. 2002), 116 Harv L. Rev. 2694, 2699-00 (2003) ("2003 Harvard Casenote").

Obviously, if one had acknowledged that he had stolen or "usurped" the land he lives on and had "decimated" the lives and culture of the previous owners, he would not be in a strong position to bring a trespass claim against the rightful owners from whom he had stolen the land should they want to reclaim possession. Similarly, his lessee would not be in a strong position to bring a trespass claim against the rightful owner, even if the lessee had a valid lease from him. Although the acknowledgment of wrongdoing may not by itself "create any substantive rights," it nonetheless transforms the legal landscape and alters the relationship of the

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[8] Another judge on the U.S. District Court for the District of Hawai'i recently stated that "Congress has made repeated findings in numerous laws declaring that the Hawaiian Monarchy was unlawfully overthrown with the aid of the United States," and quoted *Rice* v. *Cayetano*, 528 U.S. 495, 499 (2000), to explain that it is important for courts to review and respect the findings of Congress which "'recount events as understood by the lawmakers, thus insuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue.'" *Doe* v. *Kamehameha Schools/Bernice Pauahi Bishop Estate*, – F.Supp.2d –, 2003 WL 23104167, at *2 and *4 n.7 (D. Hawai'i, Dec. 8, 2003).

parties. The Apology Resolution by itself does not require the State to turn over lands to the Native Hawaiian people, but it puts the State on notice that it must carefully preserve these lands so that a subsequent transfer can take place when the political branches reach an appropriate resolution of this dispute. As the Intermediate Court of Appeals explained in *State* v. *Lorenzo*, 77 Hawai'i 219, 221, 883 P.2d 641, 643 (App. 1994), "[t]he United States Government recently recognized [in the Apology Resolution] the illegality of the overthrow of the Kingdom and the role of the United States in that event." The present case simply asks this Court to preserve the trust—which the State should be doing on its own without judicial instruction—until the legal issues raised by this recognition are resolved through the political process.

D. The Statutory and Constitutional Provisions Enacted Before 1993 Must Be Reinterpreted and Reconsidered in Light of the 1993 Apology Resolution and Related Federal and State Enactments.

The statutory provisions listed in the State's AB at pages 26-29 must be reinterpreted and reconsidered in light of the subsequently enacted 1993 Apology Resolution and comparable state enactments recognizing the illegal acquisition of the Ceded Lands and the need for reconciliation with the Native Hawaiian people and a resolution of their claims. The State asserts that OHA has "a heavy burden indeed" in challenging the constitutionality these laws, but OHA has met that burden by demonstrating that these earlier laws are inconsistent with and have been superceded by, or put in abeyance by, the subsequent laws recognizing the need for a reconciliation with the Native Hawaiian people through a settlement of their claims. *Id.* at 26. It is a widely-recognized canon of construction that the more specific

later statutes govern over the more general earlier ones. *State* v. *Hoshijo ex rel White*, 102 Hawai'i 307, 314, 76 P.3d 550, 557 (2003). Another important canon of interpretation is that statutes affecting native people should be interpreted in their favor, if any ambiguity exists.[9]

The case of *County of Skamania* v. *State*, 685 P.2d 576 (Wash. 1984), which the State relies upon at page 30 of its AB, provides, in fact, solid support for OHA's position, because it demonstrates that courts can and will strike down legislation that is inconsistent with the state's obligations to trust beneficiaries. The language

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[9] *Antoine* v. *Washington*, 420 U.S. 194, 199 (1975) (reaffirming the "canon of construction applied over a century and a half by this Court...that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice"); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666 (1979)(reaffirming the canon of construction that "statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of Indians"); *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976)(same); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918)(same); *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 354, 356 (1941)(explaining that "the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith,'" *(quoting from Choate* v. *Trapp*, 224 U.S. 665, 675 (1912), and also emphasizing "the high standards for fair dealing in light of which laws dealing with Indian rights have long been read"). *See, e.g., Artichoke Joe's California Grand Casino* v. *Norton*, 2003 WL 22998116, *16 (9th Cir. Dec. 22, 2003) (reaffirming the common canon of construction in favor of natives). In light of this Honorable Court's recognition that Native Hawaiians have the same legal status as other Native Americans, *Ahuna* v. *Dept. of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1168-69 (1982), these rules of construction should also apply to legal instruments affecting Native Hawaiians.

quoted by the State from *State by Kobayashi* v. *Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977), on page 32 of the AB ("Sale of the property would be permissible only where the sale promotes a valid public purpose") also strongly supports OHA's position, because it cannot meet "the high standard for fair dealing" required for governmental dealings with natives, *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 356 (1941), to transfer property whose ownership has been put into question by federal enactments and which must be kept intact pending a proper resolution and full reconciliation of the competing claims regarding such property.

V. The Present Claim Does Not Present a Nonjusticiable Political Question.

At pages 40-51 of its AB, the State accuses OHA of having made inconsistent statements in its OB and then it supports the conclusion of the Circuit Court that the present claim constitutes a nonjusticiable political question. OHA's statements are not inconsistent and the present claim does not constitute a nonjusticiable political question.

OHA recognizes that this Honorable Court has ruled that certain specific claims brought by Native Hawaiians for resolution of their claims constitute nonjusticiable political questions. *Trustees of the Office of Hawaiian Affairs* v. *Yamasaki, 69* Haw. 154, 737 P.2d 446 (1987); *Office of Hawaiian Affairs* v. *State*, 96 Hawai`i 338, 31 P.3d 901 (2001). The Complaint filed in the present case does not therefore ask this Court to resolve any claim, but only to protect the trust assets that are in dispute by issuing an injunction barring the sale or transfer of the trust lands. Appellants are seeking only to have this Court protect the Ceded Lands from

dissipation until the political branches can reach a just solution to this dispute.

The State argues at page 43 of its AB that language in the opinions in *Territory* v. *Kapiolani Estate*, 18 Haw. 640, 646 (1908), and *Board of Education* v. *Waihee*, 70 Haw. 253, 260, 768 P.2d 1279, 1283 (1989), indicate that the political question doctrine bars the courts from playing any role whatsoever in any matter deemed to be nonjusticiable. This position is contrary, however, to the views expressed by this Honorable Court in *Office of Hawaiian Affairs* v. *State*, 96 Hawai`i 388, 401, 31 P.3d 901, 914 (2001), where it explained that Hawai'i's judiciary will play a continuing role in monitoring the activities of the political branches in addressing and resolving the rights of Native Hawaiians as expressed in Hawai'i's Constitution, even though the political branches have the primary responsibility to find solutions to these disputes, and "will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution." The applicability of the political question doctrine to a dispute is thus not an "all or nothing" proposition, and this is a situation where the judiciary has a limited but important role in preserving the trust res even though it must defer to the political branches regarding the eventual allocation of the disputed lands.

OHA agrees with the State's statements on page 44 of its AB that the Apology Resolution does not provide a "judicial guideline as to what remedy, if any, is appropriate," and that "the solution to plaintiffs' perceived grievances lies in the political branches of the state and federal governments, not in the courts." Nonetheless, the courts have a proper role in protecting the assets in dispute while this political process continues. *See, e.g., Miami Nation of Indians of Indiana*

v. *U.S. Dept. of the Interior*, 255 F.3d 342, 347, 349 (7th Cir. 2001)(explaining that there can be "partial" political questions by noting that the original decision whether to recognize a native group as indigenous belongs to the political branches, but that the judiciary is responsible for ensuring that the regulations enacted by Congress regarding the natives are properly and fairly implemented); *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977)(explaining that the judiciary should "defer to congressional determination of what is the best or most efficient use of which tribal funds should be employed," but also noting that the judiciary has a limited role in reviewing legislation affecting natives); *Arakaki* v. *Lingle*, Order Dismissing Plaintiffs' Remaining Equal Protection Claim, 2003 U.S. Dist. Lexis 23974 (D. Haw. Dec. 9, 2003), *12 (D. Haw. Jan. 14, 2004) (explaining that "[a]lthough the power Congress has over Indian affairs is plenary, it is not absolute," *citing, Delaware Tribal Business Comm.* v. *Weeks, supra).*

The State argues at 47-51 of its AB that the political question doctrine prohibits the judiciary from issuing the injunction sought by Appellants, even if all previous Hawai`i precedents are ignored, because Congress recognized the Republic of Hawai`i as the rightful government of Hawaii in 1898, because Congress has "the sole power to govern the territories" under Article IV, Section 3 of the U.S. Constitution, because the Apology Resolution provided no judicially manageable standards, because the method of resolving the Native Hawaiian claims requires policy determinations inappropriate for judicial discretion, and because the issuance of an injunction would express a lack of respect toward the political branches of the government. AB at 42-51. The State claims that Appellants "ask this Court

to issue a stay of indeterminate length while an undefined process forms some type of new native Hawaiian polity that may or may not at some time in the future come to a settlement with either the State or the United States, which settlement may or may not involve transfer of Ceded Lands." *Id.* at 49. The State quotes from Act 329, 1997 Haw. Sess. Laws 956, where the Legislature said that the resolution of Native Hawaiian claims should "be addressed within and remain under the control of the executive and legislative branches of the state government as essentially political questions." *Id.* at 50-51.

OHA acknowledges that the ultimate resolution of the Native Hawaiian claims must be through the political processes, and it is actively engaged in these processes. But this long struggle for justice will be futile if the assets in dispute no longer exist when a solution is found. Further, the process now underway is not "undefined" or of "indeterminate length." AB at 50. It is a robust reconciliation process being managed at the state and federal levels through active involvement of the legislative and political branches.[10] A recent aca-

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[10] In the U.S. District Court's recent Order in *Arakaki* v. *Lingle*, 2003 U.S. Dist. Lexis 23974, *12 (D. Haw. Dec. 9, 2003), Order Dismissing Plaintiffs' Remaining Equal Protection Claim (D. Haw., Jan. 14, 2004), the Court explained that "[i]n the present case, Congress is still speaking on this issue," slip op. at 23, referring to the ongoing deliberations on the Akaka Bill, S. 344, 108th Cong (2003). The Circuit Court explained in its Opinion of Dec. 5, 2002 in the present case that the Akaka Bill would implement the recommendations of the Departments of Interior and Justice in their report issued Oct. 23, 2000 entitled *From Mauka to Makai: The River of Justice Must Flow Freely*, which acknowledged the federal government's trust obligations to Native Hawaiians and the right of the Native Hawaiian people to self-determination and self government. Opinion of Dec. 5, 2002 at 33 36. "The Hawai'i

demic commentator has characterized this process as based on a "moral compunction to redress historical wrongs." 2003 Harvard Casenote, 116 Harv. L. Rev. at 2700. The State's reliance upon cases such as *United States* v. *Mowat*, 582 F.2d 1194 (9th Cir. 1978), and *Fasi* v. *King*, 41 Hawai'i 461 (1956), is misplaced, because the legal context in which those cases were decided has been changed by the enactment of the Apology Resolution and the other similar state and federal statutes.[11]

Injunctions can always be revisited should the basis for them change, but the lack of an assured outcome should not bar the issuance of such an injunction.[12] In-

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State Senate and the State House of Representatives each passed resolutions in 2000 and 2001 supporting the recognition of an official political relationship between the United States government and the Native Hawaiian People, as well as the need to develop a government-to-government relationship between a native Hawaiian government and the United States." *Id.* at 32-33.

[11] It should also be noted that *Fasi* v. *King*, 41 Hawai'i 461 (1956), as a decision rendered prior to statehood, does not have the same precedential effect as one rendered after Hawai'i became self-governing. *See, e.g., Robinson* v. *Ariyoshi*, 65 Hawai'i 641, 666 n.25, 658 P.2d 287, 305 n.25 (1982), where this Honorable Court explained that decisions issued "when the judiciary was not a product of local sovereignty" need to be viewed differently from those issued after statehood.

[12] *Fechter* v. *HMW Industries, Inc.*, 879 F.2d. 1111 (3rd Cir. 1989) (affirming preliminary injunction in ERISA action prohibiting defendant corporations from transferring or selling property, with some exceptions, pending the final outcome of the pension plan action); *Northern Alaska Environmental Center* v. *Hodel*, 803 F.2d 466 (9th Cir. 1986) (preliminary injunction granted to environmental groups that barred miners' association from mining in three national parks until environmental analyses were completed); see later proceedings at *Northern Alaska Environmental Center* v. *Hodel*, 961 F. 2d 886 (9th Cir. 1992)(court has authority to relieve a party from a final judgment, order or proceeding if the

deed, it is the concern that the assets necessary to facilitate a positive outcome may no longer exist which requires the issuance of the injunction here. The issuance of an injunction preserving and protecting the trust lands would not indicate any disrespect to the legislative and political branches, but instead would protect the *status quo* in order to allow the negotiations to continue to a just and proper resolution.[13]

VI. The Circuit Court Correctly Ruled That the Ewa Marina Case Did Not Constitute Issue Preclusion or Collateral Estoppel Regarding the Present Case.

At pages 32-36 of its AB, the State argues that the unpublished decision in *Trustees of the Office of Hawaiian Affairs* v. *Board of Land and Natural Resources*, No. 19774 (Hawai'i 1998)(usually called the *Ewa Marina Case)*, "collaterally estops plaintiffs from arguing the State cannot sell Ceded Lands for public purposes." This issue was previously presented to this Honorable

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judgment has been satisfied, released or discharged, or it is no longer equitable that the judgment should have prospective application, citing Fed. R. Civ. Pro. Rule 60(b)(5)); *Greenpeace Found.* v. *Mineta*, 122 F. Supp. 2d 1123 (D. Haw. 2000) (permanent injunction granted as to Crustacean fisheries management plan where agency failed to conduct a thorough evaluation of the impact of lobster fishing on monk seals pursuant to NEPA and environmental injury was sufficiently likely); *Oregon Natural Desert Ass'n* v. *Singleton*, 75 F. Supp. 2d 1139 (D. Ore. 1999) (injunction directing agency to exclude areas of concern from any further grazing by domestic livestock was issued because public interest in preserving river corridor's values was manifest, continued degradation constituted irreparable harm, no legal remedies redressed harm, and overall economic impact was negligible).

[13] It is important also to remember that Judges Heely and Chang explicitly rejected the State's political question argument in their rulings in 1996 and 1998. *See* OB at 13-14.

Court in a motion for reconsideration filed by OHA in the *Ewa Marina Case* on April 6, 1998. Trial Exhibit 534. This Court ruled that the issue was "not ripe for determination at the present time and the proper forum for consideration of this issue would be the circuit court in a future case where collateral estoppel is actually raised and litigated." Trial Exhibit 535.

The Circuit Court addressed this issue in its December 5, 2002 Opinion, and correctly rejected the argument presented by the State. The Court explained that collateral estoppel did not apply because the issue whether the State had the power to sell or transfer the Ceded Lands was not "essential" to the ruling in the *Ewa Marina Case*, as required by *Dorrance* v. *Lee*, 90 Hawai'i 143, 976 P.2d 904 (1999),[14] because the *Ewa Marina Case* did not involve a sale but only concerned whether the Board of Land and Natural Resources could issue a permit to dredge submerged Ceded Lands. The issuance of a CDUA permit application is obviously a far cry from a *sale* of public land. The issuance of a use permit that brings benefit to the surrounding public land may be consistent with the fiduciary duties of a trustee in some circumstances, but the permanent sale or transfer of lands out of the Public Land Trust is completely inconsistent with the State's trust obligations.

In addition, the Circuit Court made the factual finding that OHA did not have "a full and fair opportunity to litigate the relevant issues" in the *Ewa Marina Case*, *i.e.*, the issues involving the State's power to sell or transfer the Ceded Lands. OB, Appendix E at 69.

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[14] *See also* 18 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, Secs. 4416, 4419, and 4421 (1981).

This requirement that a litigant have had a full and fair opportunity to brief the issue is compelled by several cases, including *Bush* v. *Watson*, 81 Hawai`i 474, 480, 918 P.2d 1130, 1136 (1996); *Pele Defense Fund* v. *Paty*, 73 Haw. 578, 837 P.2d 1247,1261 (1992); *Morneau* v. *Stark Enterprises, Ltd.*, 56 Haw. 420,421-22, 539 P.2d 472, 474 (1975); and *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980). The briefing in the *Ewa Marina Case* did not consider the 1993 Apology Resolution, the comparable legislative enactments of the Hawai`i State Legislature, the illegal overthrow of the Kingdom of Hawai`i, the uncompensated and unconsented taking of the Crown and Government lands, or the other issues related to the trust obligation owed to Native Hawaiians addressed in the present case. Trial Exhibits 534, 535.

Finally, the collateral estoppel argument was also rejected by Judge Kevin S.C. Chang in his ruling of August 27, 1998, where he denied the State's motion to dismiss or for partial summary judgment on these grounds. *See* Trial Exhibit 538.

VII. A Complete Moratorium on the Sale or Transfer of Any of the Ceded Lands Is Needed to Protect the Rights of Native Hawaiians and the Reconciliation Process.

The State argues at 36-40 of its AB that it is "logically impossible" to contend that each and every sale or transfer of lands from the Ceded Lands Trust would violate the rights of the Native Hawaiian people, and thus the blanket moratorium sought by Appellants is inappropriate. But complete moratoria were imposed in Alaska and New Zealand, and a complete moratorium is the only way to protect the rights of Hawai'i's native people while the political and legislative process

proceeds to address and resolve their claims through the reconciliation process.

The State is in denial regarding the changed legal terrain governing the Ceded Lands. Once Congress identified the cloud on the title to these lands resulting from the illegalities surrounding their transfer to the United States, it became inevitable that a hold should be put on these lands until the legal issues can be sorted out properly. Because this process affects many facets of life in Hawai'i and requires resolution of complex legal issues, it is taking a number of years. But the process is well underway at the present time, and the courts must help to facilitate this process by protecting the disputed assets during the reconciliation process. If the State were free to dissipate the trust resources, then it would be impossible to achieve the reconciliation that Congress has said is necessary.

VIII. U.S. Precedents Do Support the Issuance of the Injunction Sought by Appellants.

The State acknowledges that native rights created by treaty or statute cannot be abrogated by Congress without the payment of just compensation as required by the Fifth Amendment. AB at 52, *citing, Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). The State then tries to distinguish or dismiss the claims of the Native Hawaiian people by characterizing them as "aboriginal" in nature and thus of a different dimension. *Id.* Although the Native Hawaiian claims have aboriginal roots, they are primarily based on the fact that the lands in dispute were owned by the Kingdom of Hawai'i, which was illegally overthrown by the United States in violation of international law, and acquired "without the consent of or compensation to Native Ha-

waiians." Apology Resolution. These claims are thus substantial indeed, and Native Hawaiians have suffered injuries that were recently characterized by an academic commentator as "injuries that would typically result in tort or criminal liability." 2003 Harvard Casenote, 116 Harv L. Rev. at 2700.

Native Hawaiian claims are very close to those presented by the Pueblo Indians in *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), despite the efforts of the State to distinguish that case at pages 53-55 of its AB. It cannot be denied that the judiciary issued an injunction in *Lane* to protect and preserve lands claimed by natives, which is exactly the remedy sought here by Appellants. 249 U.S. at 112. The State argues that the present situation is different because the Pueblo Indians claimed "complete and perfect title" to the disputed lands, and because their dispute was scheduled for determination by the judiciary. OB at 54. The claims of the Native Hawaiians will be resolved by the political branches, because of this Honorable Court's rulings in previous cases, but their claims are also broad, and the recent federal and state enactments provide substantial support for the conclusion that Native Hawaiians also have "complete and perfect title" to the Ceded Lands. In any event, the only issue now before this Court, as in *Lane*, is whether the State should be prohibited from selling or transferring the lands prior to a resolution of the dispute, and *Lane* provides a direct and complete precedent to support the issuance of an injunction because such sales or transfers "would not be an exercise of guardianship, but an act of confiscation." 249 U.S. at 113.[15]

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[15] At page 56 of its AB, the State attempts to dismiss the importance of *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339

Similarly, in Alaska, a moratorium was established to protect the lands claimed by the Alaska Natives from dissipation, and, as the State recognizes at 57-58 of their AB, the Ninth Circuit rejected attempts by the State of Alaska to "unfreeze" the disputed lands.

(1941), arguing that it does not support the Circuit Court's statement at page 41 of the Opinion of Dec. 5, 2002 that "courts have enjoined sale of said lands prior to the determination of Indian title." The *Santa Fe Pac. R. Co.* case was brought by the United States on behalf of the Walapai Indians in Arizona seeking to enjoin the railroad company "from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona." 314 U.S. at 343. On January 23, 1941, the same day that the United States filed its petition for certiorari on behalf of the tribe, the railroad company "quit claimed to the United States...all lands claimed by it under the Act of July 27,1866, within the Walapai Indian Reservation," *id.* at 358-59, thus giving the United States and the Indians a victory on that part of their claim. The Supreme Court then ordered that an "accounting" take place to determine "such lands in the reservation which can be proved to have been occupied by the Walapais from time immemorial." *Id.* at 360. (The Court also ruled that the Walapais were not entitled to the lands outside their reservation, because "their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation." *Id.* at 358.)

In the course of its opinion, the U.S. Supreme Court explained that the claims of natives "to any particular lands" need not "be based upon a treaty, statute, or other formal government action," *id.* at 347, and that "Indian 'right of occupancy is considered as sacred as the fee-simple of the whites.'" *Id.* at 345 *(quoting from Mitchel* v. *United States*, 9 Pet. 711, 746 (1835)). Although Congress can extinguish Indian title, *id.* at 347, such action cannot be presumed in the absence of "plain and unambiguous action." *Id.* at 346. This litigation thus served to freeze the *status quo* for a time and ultimately enabled the Walapais to expand the lands they controlled, illustrating that the courts can and do act to protect the rights of natives and providing something of a roadmap for the present case.

Alaska v. *Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970). Although the State attempts to dismiss the importance of the case of *Native Village of Allakaket* v. *Hickel*, Civ. Action No. 706-70 (D.D.C. April 3, 1970), by characterizing it as "unremarkable," AB at 59, it also acknowledges that the decision did enjoin "the executive branch...from disposing of land allegedly owned by natives pending judicial resolution on the merits of the title issue," and that this action took place prior to the Congressional enactment of the Alaska Native Claims Settlement Act of 1971, and thus at a time when the land claims of the Alaska Natives were quite unresolved. It cannot be denied, therefore, that courts in the United States have issued injunctions comparable to the one sought by Appellants in the present case.

IX. Precedents from Other Countries and Principles of International Law Are Not "Irrelevant" to the Present Claim.

It has long been recognized that customary international law is part of U.S. federal common law, and, as such, must be followed by state courts under the Supremacy Clause.[16] During the past U.S. Supreme

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[16] *See, e.g.*, *Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); *Kadic* v. *Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao* v. *Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 881-82, 886-87 (2d Cir. 1980); *People* v. *Liebowitz*, 140 Misc.2d 820, 822, 531 N.Y.S.2d 719, 721 (1988)("Even in the absence of a treaty, it is a court's obligation to enforce recognized principles of international law where questions of right depending on such principles are presented for the court's determination."); *Republic of Argentina* v. *City of New*

Court session, the majority opinion in *Lawrence* v. *Texas*, __ U.S. __, 123 S.Ct. 2472, 2483 (2003), referred specifically to decisions of the European Court of Human Rights to support its conclusion that the privacy and liberty rights protected by the U.S. Constitution include the right to private intimate sexual activity with the partner of one's choice. Similarly, Justice Ginsburg, in her concurring opinion in *Grutter* v. *University of Michigan*, __ U.S. __, 123 S.Ct. 2325, 2347 (2003), referred to the International Convention on the Elimination of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, for guidance on whether affirmative action programs should have a termination point. It cannot be doubted, therefore, that it is appropriate for courts in the United States to examine international law norms and rulings from other jurisdictions for guidance regarding questions presented to them. The actions of the courts in New Zealand and in other jurisdictions discussed in OHA's OB at pages 40-45 and in the Circuit Court's Opinion at 37-42 are thus highly relevant to the present dispute, particularly since the Maori in New Zealand and the Native Hawaiians are Polynesian cousins and because their conflicts with colonizing Westerners during the nineteenth century led to similar disenfranchisements, loss of land, and loss

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York, 250 N.E.2d 698, 700 (N.Y.Ct.App. 1969)(action "in this case is mandated by the rules of international law. It is settled that ... all domestic courts must give effect to customary international law."); *State* v. *Pang*, 940 P.2d 1293, 1322 (Wash. 1997) ("International law is incorporated into our domestic law."); *Peters* v. *McKay*, 238 P.2d 225, 230-31 (Ore. 1951) ("[I]nternational law is part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference, and ... relevant provisions of the law of nations are legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce them").

of culture. The State's AB relies upon this Honorable Court's decision in *State* v. *Marley*, 54 Haw. 450, 509 P.2d 1095 (1973), but that case provides no support for its position that international cases and principles of customary international law are "irrelevant" to the present dispute. AB at 60-61. The *Marley* defendants argued that their conduct was justified by the doctrine of "necessity," based both on domestic and international law principles, because the conduct of U.S. military forces in Vietnam was allegedly contrary to the principles confirmed in the Nuremberg Tribunals. 54 Haw. at 452. Although the *dicta* in the *Marley* opinion is confusing,[17] its holding was consistent with other

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[17] The *Marley* opinion took language from *Skiriotes* v. *Florida*, 313 U.S. 69, 72-73 (1941), out of context. 54 Haw. at 452. The *Skiriotes* decision reached the unremarkable conclusion that Florida could regulate the harvesting of sponges by U.S. citizens in the waters offshore from Florida, a conclusion that is wholly consistent with international law (under the nationality principle of jurisdiction) when the case was decided and also at present. 313 U.S. at 72. In explaining this conclusion, the *Skiriotes* opinion points out that international law does not restrict how a nation regulates the conduct of its own citizens, even when they are outside its borders. *Id.* From this holding, the *Marley dicta* jumped to the conclusion that "if such conduct can be regulated even outside the borders of the state and nation, it follows a fortiori that such conduct may be regulated within state borders, regardless of 'international law.'" 54 Haw. at 468-69, 509 P.2d at 1107.

Since 1941, however, the content of international law has changed dramatically and it now embraces important principles designed to protect the human rights of all individuals, including the rights of indigenous peoples, as summarized in the Circuit Court's December 5, 2002 Opinion at 37-40. Because of these developments, and because customary international law is part of federal common law governing state courts, this Honorable Court must examine and apply the relevant principles of customary international law relevant to this case. *See, e.g.*, *Roxas* v. *Marcos*, 89 Hawai'i 91, 130, 969 P.2d 1209, 1248 (1999)(explaining that the act

courts of the time, which ruled that persons who destroyed property in the United States to protest the Vietnam War did not have standing to raise the "Nuremberg defense" because they themselves were not put into any position where they were required to violate the Nuremberg principles.

In any event, the *dicta* in *Marley* has not been followed by this Honorable Court, and like the courts in other states, Hawai`i's courts have adhered to and utilized principles of customary international law both before and after the *Marley* opinion.[18]

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of state doctrine as developed by federal courts is "binding on state courts").

[18] Among the many cases that can be cited to illustrate the reliance on customary international law by Hawai'i's courts are *Eto* v. *Muranaka*, 99 Hawai'i 488, 499 n. 8, 57 P.3d 413, 424 n. 8 (2002) (citing to a State Department summary of the "general principle of international law" applicable in enforcement cases); *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998) (utilizing customary international law principles to determine that Ferdinand Marcos was not entitled to head-of-state immunity for charges of battery, false imprisonment, and conversion that were alleged to have occurred while he was President of the Philippines); *State* v. *Lorenzo*, 77 Hawai'i 219, 220-21, 883 P.2d 641, 642-43 (App. 1994) (*quoting* customary international law principles codified in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES to question whether the sovereignty of the United States over Hawai'i should be recognized in light of the illegal use of force during the overthrow of the Kingdom of Hawai'i); *Application of Island Airlines, Inc.*, 47 Haw. 1, 130, 133, 384 P.2d 536, 574, 576 (1963) (Tsukiyama, J., dissenting) ("From the inception of its judicial history, this court has consistently recognized the law of nations governing the international status of the high seas." "Firmly recognized and accepted is the principle that international law constitutes a part of the law of the nation and as such must be administered by its judiciary and confirmed to by the executive and legislative branches."); *Territory* v. *Martin*, 19 Haw. 201, 1908 WL 1232, *7 (1908) (Ballou, J., concurring)(explaining that "under the

X. Appellants' Claims Are Not Barred by the Doctrines of Waiver and Estoppel.

The crucial event affecting OHA's legal position on the sale of Ceded Lands was the passage of the Apology Resolution in November 1993. Within ten months of its passage, the OHA Trustees adopted the policy that Ceded Lands should not be sold or transferred. The State's AB totally ignores the fact that in negotiating with the State on the Leiali`i lands, the State's then-Attorney-General Robert Marks recognized that OHA had valid concerns about the impact of any agreement involving the Leiali`i lands on broader Native Hawaiian claims to the Ceded Lands. The Attorney General's Office drafted disclaimer language to address these concerns and OHA's Board accepted the disclaimer; but other state officials then rejected this language. *See* OB at 11-12. The filing of this lawsuit followed the breakdown of these good-faith negotiations. OHA sought to protect its interests in a less con-

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principles of international law" local legislation remained in force after annexation); *In re Assessment of Taxes, Commercial Pacific Cable Co.*, 16 Haw. 396, 1905 WL 1330, *4 (1905) (quoting from standard international law textbooks to support the taxing of property in the territorial sea surrounding the islands); *W. C. Peacock & Co., Ltd.* v. *Republic of Hawai`i*, 12 Haw. 27, 1899 WL 1521 (1899) (explaining that the U.S. Constitution must be construed with reference to recognized principles of international law); *Spencer* v. *McStocker*, 11 Haw. 581, 1898 WL 1590 (1898) (looking to principles of international law to determine the nationality of a vessel); *Carter* v. *Mutual Life Ins. Co. of N.Y.*, 10 Haw. 562, 1896 WL 1689 (1896) (looking to principles of private international law to resolve a divorce issue); *Low* v. *Homer*, 10 Haw. 531, 1896 WL 1684, *5 (1896) (looking to principles of private international law to resolve a debt dispute); *In the Matter of McCarthy*, 5 Haw. 573, 1886 WL 3515 (1886) (looking to principles of international law to determine if a country is entitled to surrender a fugitive to another country in the absence of an extradition treaty).

frontational manner, but when that approach failed, it became necessary to file this lawsuit. Moreover, it should be remembered that throughout this period, the OHA Trustees acted according to their own fiduciary responsibilities.

The AB has not addressed the significant factual differences between cases such as *Univ. of Haw. Prof Assembly* v. *Univ. of Haw.*, 66 Haw. 214, 659 P.2d 720 (1983), involving private rights and an actual agreement between the parties, and the instant case involving the rights of a native people where no agreement had been reached by the parties. Finally, contrary to assertions in the AB, OHA's citations to Indian law cases is entirely appropriate to show that in dealing with native peoples, courts will not apply equitable doctrines that would act to the detriment of the native group if to do so would interfere with the government's trust obligations to the native group. Similarly, this Court should not apply the doctrines of waiver or equitable estoppel to the actions of the OHA Trustees in their efforts to fulfill their fiduciary responsibilities to Native Hawaiians.

XI. Appellee's Concerns About the Form of Appellant's OB Are Without Foundation

In its Section IV(D) of its AB, on pages 69-70, Appellee asserts that OHA's OB fails to meet the requirements of HRAP Rule 28. Section III of OHA's OB, at pages 17-24, lists in detail all the points in error raised by Appellant with careful references to the record and to the Circuit Court's opinion, which was attached to the OB as an appendix, and including quotations of the key language in the Circuit Court's opinion that is being challenged in this appeal. Given the fact that OHA is challenging a 102-page ruling, this detailed

listing of the points in error meets the requirements of HRAP Rule 28(b)(4) and provides proper notice to Appellee and to this Honorable Court regarding the points raised by Appellant.

On January 1, 2004, the Hawaii Supreme Court amended Rule 32(b), Hawaii Rules of Appellate Procedure, and the opening Brief complies with the new rule. OHA apologizes for its inadvertent error and requests this Honorable Court's forebearance. However, there has been no prejudice to the State. In fact, the State has stated: "[T]he State agreed that appellees could file an opening brief of whatever length they needed so that they could fully develop their argument. Appellees chose 50 pages." Defendants-Appellee's Memorandum In Opposition To Plaintiffs-Appellants' Office of Hawaiian Affairs and Board of Trustees' Ex Parte Motion To File Extended Reply Brief filed January 21, 2004.

XII. Conclusion.

The State's authority over the Ceded Lands is limited because of the recognition by the federal and state governments that these lands were acquired after actions that were "illegal" and in violation of "international law." Just as a person who knowingly possesses stolen goods is not free to alienate those goods, but must try to return them to their rightful owner, the State is no longer free to transfer or sell the Ceded Lands. Because it has been determined that the Ceded Lands were acquired as a result of unresolved illegal activity and because of "the high standards for fair dealing in light of which laws dealing with Indian rights have long been read," *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 356 (1941), the State is duty-bound to hold the Ceded Lands pending instructions from the

political branches and the courts regarding their proper disposition. For these reasons, and those presented in the OB, the decision of the Circuit Court must be reversed, and an injunction must issue prohibiting the State of Hawai`i from selling or transferring any of the Ceded Lands until the dispute over these lands is resolved.

DATE: Honolulu, Hawai'i, January 26, 2004.

/s/
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Attorneys for the Office of Hawaiian Affairs.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

No. 25570

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Plaintiffs-Appellants,
v.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, *et al.*,
Defendants-Appellees.

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STATE OF HAWAII]

PLAINTIFFS-APPELLANTS PIA THOMAS ALULI, JONATHAN KAMAKAWIWO'OLE OSORIO, CHARLES KA'AI'AI, AND KEOKI MAKA KAMAKA KI'ILI'S REPLY BRIEF

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I. ARGUMENT

A. Summary of Argument

Plaintiffs-Appellants Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'ai'ai, and Keoki Maka Kamaka Ki'ili, (collectively "Aluli") submit this reply brief in opposition to the State of Hawaii's answering brief. Aluli Plaintiffs-Appellants also hereby incorporate by reference OHA's opening and reply briefs.

The pertinent issues in this appeal are: (1) given the statements in Act 354 (1993), Act 359 (1993) and the Apology Resolution (collectively "1993 Legislation") that admitted that Hawaiians have a claim to the ceded lands, would the State breach fiduciary duties as ceded lands trustee by selling ceded lands before that claim is resolved; (2) are there judicially manageable standards for the Court to decide this breach of fiduciary duty issue; (3) does the doctrine of sovereign immunity bar the issuance of an injunction prospectively preventing State officials from selling Leialii and/or ceded lands; and, (4) did the Plaintiffs-Appellants waive their objec-

tions to the Leialii sale by not objecting after the passage of the Apology Resolution (on 11/23/93) until 9/15/94.

In its answering brief, the State side-steps the pertinent issues and instead: (1) focuses on events and laws in effect before the 1993 Legislation; (2) fails to address whether the State would breach fiduciary duties by selling ceded lands given the admissions in the 1993 Legislation; and, (3) argues that Hawaiians' entitlement to the ceded lands is a political question even though Plaintiffs-Appellants are not seek a determination that they are entitled to the ceded lands but instead only seek an injunction barring such sales before resolution of that claim.

Plaintiffs-Appellants are entitled to the requested injunction[1], because the 1993 Legislation admits that Hawaiians have a claim to the ceded lands, the State is a trustee of the ceded lands trust, the Hawaiians are beneficiaries of the ceded lands trust, the State owes the same duties as private trustees, and trust law pro-

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[1] P. 56 of Individual Plaintiffs' Closing Argument set forth the requested relief as:

> For the above reasons, justice requires that the Court: (1) permanently enjoin Defendants, and their agents, officers, employees and any persons acting in concert or participation with them, from selling, transferring or alienating ceded lands, including the ceded lands that comprise the Leialii and Laiopua projects, to entities that are not political subdivisions of the State, as defined in Article 8, § 1 of the Hawaii Constitution,[1] until the claims of native Hawaiians and Hawaiians, as defined by HRS § 10-2, to the ceded lands is settled or resolved, except that the State may continue its current practice of transferring remnants, and issuing licenses, permits and leases concerning ceded lands; and (2) provide instructions to Defendants, and their agents, officers, employees and any persons acting in concert or participation with them, consistent with said permanent injunction.

vides that a trustee cannot alienate trust property where some of the beneficiaries have a claim to the trust property. The answering brief at p. 43 also admits that, "[t]hese enactments [1993 Legislation] posit that the overthrow was illegal and that the Ceded Lands were transferred without compensation."

B. Breach of Fiduciary Duties

The Aluli opening brief at pp. 17-19 stated that the State's fiduciary duties as ceded lands trustee are set forth in HRS § 673-1 (a), *Pele Defense Fund* v. *Paty*, 73 Haw. 578, 837 P.2d 1247, n. 19 (1992), and *Ahuna* v. *Department of Haw'n Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). The answering brief did not dispute that as trustee of the ceded lands trust, the State owes Hawaiians the same duty as a private trustee.

The Aluli opening brief at pp. 19-26 next explained that the relevant trust duties include:

(1) The Restatement of the Trust (Third) § 183 (1992) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."[2]);

(2) The Restatement of the Trust (Second) § 166(2) (1959) ("The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such compliance would be a serious criminal offense or would be injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.");

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[2] The 1959 version of this rule was cited in *Ahuna* v. *Department of Haw'n Home Lands*, 64 Haw. 327, 340, 640 P.2d 1161 (1982).

(3) Comments on § 166 ("If the trustee is in doubt whether a term of the trust is illegal, he may apply to the proper court for instructions.");

(4) Restatement of the Trust (Third) § 28 (Tentative Draft No. 2, March 10, 1999) ("[a]n intended trust or a trust provision is invalid if its purpose or performance is unlawful.");

(5) Comments to § 28 ("trusts that may fail in whole or in part because a third party is entitled to set aside the settlor's transfer to the trustee or to reach the property in the trustee's hands. Illustrative are cases in which the trust property had been illegally acquired by the settler" and "[i]f a settlor transfers property upon a trust the terms of which provide for the trustee to engage in conduct which at the time of the creation of the trust is lawful but which, owing to a change of law or of circumstances, subsequently becomes unlawful, the terms in question become unenforceable."); and,

(6) Restatement of the Trust (Second) § 167 (1959) ("The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes, of the trust; . . . and "the trustee is subject to liability for failure to apply to the court for permission to deviate from the terms of the trust, if he knew or should have known of the existence of those circumstances.")

The State's answering brief does not dispute that the State's trust duties include the above-cited sections of the Restatement of Trust. Accordingly, since the 1993 Legislation admits that the Hawaiians have a claim to the ceded lands, the State would violate Restatement of the Trust (Second) § 166(2) if it sold ceded

lands before resolution of that claim. Significantly, since comment (a) of Restatement of the Trust (Third) § 28 provides that the trust may fail in whole or in part where the trust property is illegally obtained from a third party, there are even greater burdens on the trustee where the settlor illegally acquired the property from a beneficiary. Under these circumstances, the trustee would clearly breach fiduciary duties, specifically the duty of impartiality, if it sold ceded lands against the interests of the Hawaiians before resolution of the Hawaiians' claim to the ceded lands.

C. Sovereign Immunity Exception

The doctrine of sovereign immunity does not apply because Plaintiffs are seeking prospective injunctive relief, the State waived sovereign immunity in H.R.S. Chapter 673 and the Court also has the power to issue instructions to the State, as trustee of the ceded lands trust.

Pele Defense Fund v. *Paty*, 73 Haw. 578, 606, 837 P.2d 1247, 1264 (1992) ("*PDF*") held that "beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials breach of trust by disposal of trust assets". The answering brief at p. 17 argues that this holding does not apply because the Admission Act, the Hawaii constitution and Hawaii statutory provisions authorize the State to sell ceded lands. This response begs the question of whether it would be a breach of fiduciary duties to sell ceded lands in the face of the admissions in the 1993 Legislation. The State does not explain why selling ceded lands after the 1993 Legislation would not violate the above-cited Restatement of Trust provisions.

The answering brief at p. 10 argues that the Leialii land was transferred from the State to HFDC on

11/4/94 (for $1) and by then the State had already expended $31M on infrastructure. However, the Leialii land was not transferred to a third-party as in *PDF*. Furthermore, Aluli is not requesting that the Leialii land be transferred to Hawaiians. The State continues to have possession, use and enjoyment of the Leialii land and the infrastructure. Unlike in *PDF*, the requested injunction would not require a payment to a third-party to re-purchase the Leialii lands or the payment of any funds or the transfer of lands to any person or entity. The exception to sovereign immunity recognized in *PDF* applies in this case.

The answering brief at pp. 17-18 cites to *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) for the proposition that the declaratory and injunctive relief the tribe sought was "close to the functional equivalent of a quiet title". The State, however, fails to mention that the Coeur d'Alene Tribe was seeking ownership, beneficial interest and exclusive use of the subject submerged lands. *Id.* at 2031 ("Whether the Coeur d'Alene Tribe's ownership extends to the banks and submerged lands of the lake and various of these rivers and streams, or instead is vested in the State of Idaho, is the underlying dispute.") The Court also held at 2032:

> In addition to its title claims, the Tribe further sought a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged lands.

Thus, the *Coeur d'Alene Tribe* case does not apply to this case because Plaintiffs-Appellees are not seeking ownership or use of ceded lands. The key to this appeal is that the Circuit Court did not have to decide any title issue because the 1993 Legislation admitted that Hawaiians have a claim to the ceded lands. *See* Apology Resolution ("Whereas the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands" arising out of the "illegal overthrow"); Act 354 (1993) ("The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians."); and Act 359 (1993) ("As a result [of the illegal overthrow], the indigenous people of Hawaii were denied . . . their lands and their ocean resources." The existence of the claim requires that the State as trustee cannot ignore that claim.

With respect, to the timing of the Leialii transaction:

(1) DLNR transferred the Leialii lands to HFDC on 11/4/94—the same, day the Complaint was filed;

(2) HFDC paid DLNR one dollar ($1.00) for the transfer to HFDC;

(3) The transfer was not recorded in the Bureau of Conveyances or the Land Court;

(4) OHA did not accept the $5,573,604.40 offered by the State;

(5) OHA did not sign any appraisal acceptance agreement or memorandum of understanding [ROA, Vol. 19, at 90, (Trial Ex. 135) and ROA, Vol. 19, at 19 (Trial Ex. 138)]; and,

(6) HFDC (now HCDCH) is a political subdivision of the State, and its Board members are officers of the State who owed, and breached, ceded lands trust fiduciary duties to Hawaiians by proceeding with the conveyance on 11/4/94 knowing that OHA objected to the conveyance. [ROA, Vol. 19, at 91 and 92 (Trial Exs. 139, 143, 144, 146 and 147)]

Under these circumstances, it is illogical and inequitable for the Circuit Court to characterize the requested injunctive relief as non-prospective because "title to these lands has already been the transferred to HFDC." (Appendix G at 62-63.) The State's answering brief did not dispute the above facts or address this argument.

D. No Waiver or Estoppel

Based on the sequence of events in the Opinion (ROA, Vol. 16, at 238-245) and facts set forth in the *Facts: Lands at Leialii* section of the Aluli answering brief at pp. 9-10, it is clear that in 9/94, William Meheula convinced OHA that the 1993 Apology Resolution included provisions wherein the United States for the first time formally admitted in legislation the factual foundation for the Hawaiians' claim to ownership of the ceded lands. Mr. Meheula's discussions with the OHA Board caused it to insist that a disclaimer be placed in the HFDC agreements. Although OHA did not earlier object to the transfer of ceded lands for ultimate sale to homeowners in the Leialii project, the 1993 Legislation and Mr. Meheula's discussions with the OHA Board in 9/94 were new events that justified their objection in 9/94.[3] In addition, estoppel is an equitable defense,[4] and

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[3] *State* v. *Mitchell*, 94 Hawai'i 388, 15 P.3d 314, 320 (2000) ("A waiver is the knowing, intelligent, and voluntary relinquishment of

the 1993 Legislation obligated the State to seek instructions from the Court before selling ceded lands without prompting by Plaintiffs.[5] The Opinion's conclusion [see Appendix G, at 65] that Plaintiffs' delay in objecting from the passage of the Apology Resolution (11/13/93) to 9/94 constitutes waiver is clearly erroneous because there is no evidence that any one came up with this basis for objecting before Mr. Meheula introduced it to the OHA Board and Attorney General Marks. Moreover, pursuant to *Hawaiian Trust et als.* v. *Gonser et als.*, 40 Haw. 245 (1953) and the Restatement of the Trust (Second) § 167(3), the 1993 Legislation constitutes changed circumstances requiring the State to apply to the court for permission to withhold its exercise of the power to sell ceded lands pending resolution of the Hawaiians' claim to the ceded lands.

E. No Political Question

Lane v. *Pueblo of Santa Clara*, 249 U.S. 110, 114 (1919) and *Pele Defense Fund* v. *Paty*, 73 Haw. 578, 837 P.2d 1247 (1992) demonstrate that the United States Supreme Court and the Hawaii Supreme Court do not deem this type of case a non-justiciable matter. Moreover, there are many trust laws that provide "judicially

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a known right."); *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209, 1242 (1999) ("Pursuant to the doctrine of judicial estoppel, '[a] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.'")

[4] *Fred* v. *Pacific Indem. Co.*, 53 Haw. 384, 494 P.2d 783, 786 (1972) (estoppel an equitable defense).

[5] Restatement of the Trust (Second) § 166, Comment e, § 167(3) and § 259 (1959); and *see* Appendix H at 47.

discoverable and manageable standards for resolving" this case. *Office of Hawaiian Affairs* v. *Yamasaki*, 69 Haw. 154, 173, 737 P.2d 446 (1987).

II. CONCLUSION

For the above-stated reasons, Aluli Plaintiffs-Appellants submit that Judge McKenna's decision should be reversed.

DATED: Honolulu, Hawaii, January 26, 2004.

/s/

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PETITIONER'S BRIEF

113

No. 07-1372

Supreme Court, U.S
FILED
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IN THE

Supreme Court of the United States

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29 percent of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with Native Hawaiians about the status of that land.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Hawaii were:

Office of Hawaiian Affairs; Rowena Akana; Haunani Apoliona; Dante Carpenter; Donald Cataluna; Linda Dela Cruz; Colette Machado; Boyd P. Mossman; Oswald Stender; and John Waihe'e, IV, in their official capacities as members of the Board of Trustees of the Office of Hawaiian Affairs;* Pia Thomas Aluli; Jonathan Kamakawiwo'ole Osorio; Charles Ka'ai'ai; and Keoki Maka Kamaka Ki'ili (Plaintiffs-Appellees); and

Housing and Community Development Corporation of Hawaii (HCDCH); Robert J. Hall, in his capacity as Acting Executive Director of HCDCH; Charles Sted, Chair; Stephanie Aveiro; Francis L. Jung; Charles King; Lillian B. Koller; Betty Lou Larson; Theodore E. Liu; Travis Thompson; Taiaopo Tuimaleialiifano, Members of the Board of Directors of HCDCH;** State of Hawaii; and Linda Lingle, in her capacity as Governor of the State of Hawaii (Defendants-Appellants).

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* Walter Meheula Heen has replaced Dante Carpenter, and Robert K. Lindsey, Jr. has replaced Linda Dela Cruz.

** Robert J. Hall, Charles Sted, Stephanie Aveiro, Lillian B. Koller, Travis Thompson, and Taiaopo Tuimaleialiifano no longer serve on the Board of Directors of HCDCH, and Charles King now serves as Chair. David A. Lawrence, Georgina Kawamura, Linda Smith, Ralph M. Mesick, and Allan Los Banos, Jr. now serve as Directors.

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IN THE

Supreme Court of the United States

No. 07-1372

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII

BRIEF FOR PETITIONERS

OPINION BELOW

The decision of the Supreme Court of Hawaii is published at 177 P.3d 884 (Haw. 2008) and is reprinted in the appendix to the petition ("Pet. App.") at 1a-100a.

JURISDICTION

The Hawaii Supreme Court issued its decision on January 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1257. The topic of jurisdiction is addressed in Part I of the Argument below.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the

Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution"), is reprinted at Pet. App. 103a-111a.

The Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, is reprinted at Pet. App. 113a-132a.

The Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55-55, 30 Stat. 750 (1898) ("Newlands Resolution"), is reprinted in the Appendix to this brief ("App.") at 1a-3a.

The Act to Provide a Government for the Territory of Hawaii, Ch. 339, 31 Stat. 141 (1900) ("Organic Act"), is reprinted in relevant part at App. 4a-5a.

The Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), is reprinted in relevant part at App. 6a.

The Act to Amend Section 73(1) of the Hawaiian Organic Act, Pub. L. No. 82-483, 66 Stat. 515 (1952), is reprinted in relevant part at App. 7a.

STATEMENT

In 1993, Congress marked the 100th anniversary of the overthrow of the Hawaiian monarchy by enacting the Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, which expresses the federal government's regret for the role of federal officials in the overthrow. In this case, the Supreme Court of Hawaii held that this symbolic Resolution tacitly but materially impairs the State's sovereign authority over nearly all State-owned lands. The court found that the Resolution both placed a "cloud on the title" to these lands and recognized Native Hawaiian land claims that Congress had extinguished when it annexed Hawaii to the United States in 1898. On that basis, the Court concluded that "the

Apology Resolution dictates that [these] lands should be preserved" against any transfer by the State until the federal and state governments have reached some undefined "reconciliation" with "the native Hawaiian people" who now assert title as a group. Pet. App. 85a.

Nothing in the Apology Resolution remotely supports that outcome; indeed, the Resolution does not purport to address either Hawaii's sovereign powers or its title to state lands. In addition, the federal law annexing Hawaii to the United States in 1898 as well as subsequent federal legislation foreclose the Hawaii Supreme Court's premise that Native Hawaiians may have valid land claims that an injunction against land sales is needed to preserve. In issuing this injunction, the Hawaii Supreme Court both misconstrued the Apology Resolution and disregarded the annexation law's conclusive determination that the United States obtained absolute fee title and ownership to these lands. The result is an affront to state sovereignty, committed in the name of federal law but actually in gross disregard of federal law.

1. History of the Ceded Lands

In 1893, with the involvement of certain United States officials, the Hawaiian monarchy under Queen Lili'uokalani was overthrown, and the Republic of Hawaii was declared in its place. *See generally Rice* v. *Cayetano*, 528 U.S. 495, 499-506 (2000). In 1898, Congress enacted, and President McKinley signed, the Newlands Resolution, which annexed Hawaii to the United States. App. 1a-3a.[1] The Newlands Resolution

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[1] A "joint resolution" passed by the Senate and House of Representatives and signed by the President has the same legal status as an ordinary statute. *See* U.S. Const. art. I, § 7; *United States ex*

recognized the Republic of Hawaii and recited that the Republic had both relinquished sovereignty to the United States and "cede[d] and transfer[red] to the United States the absolute fee and ownership" of approximately 1.8 million acres of former crown and government lands, now known as the "ceded lands." App. 1a. The Resolution affirmed that all such "property and rights" to these lands "are vested in the United States of America." *Id.*

For several decades thereafter, Hawaii remained a federal territory, and Congress delegated to the territorial government broad powers over these ceded and thus federal lands. *See* Part II.B, *infra*. In March 1959, Congress enacted the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (Pet. App. 113a-132a), which specified the terms on which Hawaii would enter the Union after its citizens voted for statehood in a plebiscite. Two months later, on June 27, the people of Hawaii voted by a margin of 17 to 1 in favor of statehood. Harold S. Roberts, *Preface* to *Proceedings of the Constitutional Convention of Hawaii*, 1950, at xi (1960). Hawaii became the 50th State shortly thereafter.

Under the Admission Act, the United States transferred to the new State full title to most of the ceded lands (keeping some 350,000 acres) and directed the State to hold these lands in public trust. Pet. App. 115a-117a. Section 5 of the Act provides that these

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rel. Levey v. *Stockslager*, 129 U.S. 470, 475 (1889); *see also Bowsher* v. *Synar*, 478 U.S. 714, 756 (1986) (Stevens, J., concurring in the judgment). Both the Newlands Resolution and the Apology Resolution fall into this category.

lands, which now total 1.2 million acres,[2] "together with the proceeds from the *sale or other disposition* of [these] lands and the income therefrom, shall be held by [the] State as a public trust" to promote one or more of five purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

Pet. App. 116a-117a (emphasis added). Section 5(b) of the Admission Act provides that this grant of title to Hawaii was made "in lieu of any and all grants provided for new States by provisions of law other than [the Admission Act], and such grants shall not extend to the State of Hawaii." *Id.* at 115a.

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[2] The land area of the State of Hawaii totals about 6,422.6 square miles, *see* Hawaii State Databook, tbls. 5.07, 5.08, *available at* http://hawaii.gov/dbedt/info/economic/databook/db2006/section05.pdf (last modified Jan. 15, 2008), which equals about 4,110,464 acres. Thus, the approximately 1.2 million acres of ceded land at issue here constitute about 29 percent of the total land area of the State and nearly all of the approximately 1.3 million total acres of land owned by the State. *See* State of Hawaii GIS Program, Map No. 20080411-04-DK (Apr. 11, 2008), *available at* http://hawaii.gov/dbedt/gis/maps/state_lands_non-dhhl_statewide. These figures exclude the separate 200,000 acres that Congress set aside in the Hawaiian Homes Commission Act (Act of July 9, 1921, ch. 42, 42 Stat. 108), which "created a program of loans and long-term leases for the benefit of native Hawaiians." *Rice*, 528 U.S. at 507-509.

Just as the Admission Act anticipates that the State will earn "proceeds from the sale" of ceded lands, Pet. App. 116a, Hawaii state law likewise authorizes the State not just to hold the land and (for example) collect leasehold revenues from it, but also to sell it outright to private parties. *E.g.*, Haw. Rev. Stat. § 171-45 (the State may "dispose of public land for personal residence purposes ... by sale in fee simple"); *see also* Haw. Rev. Stat. §§ 171-13, 171-41, 171-42. Indeed, *without* the power to sell the ceded lands in fee simple, the State could not promote the third of the five purposes of the Admission Act: "the development of farm and home ownership on as widespread a basis as possible." Hawaii law further provides that "[a]ll funds derived *from the sale* ... or other disposition" of the ceded lands "or acquired in exchange for [those] lands" shall "be held as a public trust" for the purposes specified in the Admission Act. Haw. Rev. Stat. § 171-18 (originally adopted in 1962 Haw. Sess. L. Act 32) (emphasis added).[3] In short, federal and state law both authorize the State to sell ceded lands to private purchasers so long as it holds the proceeds in trust for the citizens of Hawaii in accordance with Section 5(f) of the Admission Act.

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[3] *See also* Haw. Const. art. XI, § 10 ("The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible."); Haw. Const. art. XII, § 4 (ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public"); *id.* § 6 (OHA board shall "manage and administer the *proceeds from the sale or other disposition*" of lands, "including all income and *proceeds from that pro rata portion* of the trust referred to in section 4 of this article for native Hawaiians") (emphasis added).

One of the recipients of the monies derived from the ceded lands is respondent Office of Hawaiian Affairs ("OHA").[4] In 1978, a state constitutional convention established OHA to receive and manage a portion of that income, including "the proceeds from the sale or other disposition of the [public trust] lands," for the benefit of native Hawaiians—the second of the five purposes identified in the Admission Act. Haw. Const. art. XII, §§ 4-6; *see also* Haw. Rev. Stat. ch. 10. Since then, OHA has received a substantial portion of the monies derived from the ceded lands. 1980 Haw. Sess. L. Act 273, at 525, *abrogated by* 1990 Haw. Sess. L. Act 304, § 3, at 948, Haw. Rev. Stat. § 10-2 (substituting the word "revenue" for "funds"); *see also Office of Hawaiian Affairs* v. *State*, 31 P.3d 901 (Haw. 2001). As of June 30, 2007, these monies, including earnings, totaled $458,315,573. *See* Office of Hawaiian Affairs, *Financial Statements and report of Independent Certified Public Accountants* 12 (June 30, 2007), *available at* http://www.oha.org/pdf/FY_2007_OHA_Audited_Financial_Statements.pdf.

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[4] As used in state law, the noun "Hawaiian" refers not to all inhabitants of Hawaii, but to the subset who can trace some ancestry to the Islands' pre-1778 inhabitants, and "native Hawaiian" is defined more narrowly to encompass only "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778." *Rice*, 528 U.S. at 499. As discussed below, the federal Apology Resolution uses the term "Native Hawaiian" to encompass the broader class of people denoted by the term "Hawaiian" under state law. Because the distinction between that class and its subclass is not essential to the issues presented here and because the Resolution is central to this case, this brief uses the term "Native Hawaiian" in the broader sense used in the Resolution.

2. The Apology Resolution

In 1993, Congress enacted the Apology Resolution and summarized its purpose as follows:

> [I]t is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians[.]

Pet. App. 109a.

The Resolution sets forth a list of historical findings, followed by three sections of operative text. Section 1, titled "Acknowledgment and Apology," recites that Congress:

> (1) ... acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;
>
> (2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;
>
> (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

> (4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and
>
> (5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

Pet. App. 110a.

Section 2 of the Apology Resolution defines the term "Native Hawaiian" to include "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." Section 3 then states:

> Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

Pet. App. 111a. No provision of the Apology Resolution impairs or even addresses Hawaii's sovereign right to control or alienate any of the lands it owns.

3. This Litigation

a. This case began in 1994, shortly after President Clinton signed the Apology Resolution into law. The dispute began over a parcel of land in West Maui referred to as the "Leiali'i parcel." Since 1987, the State's affordable housing authority, the Housing Finance and

Development Corporation (HFDC),[5] had been working to develop the Leiali'i parcel, in part for sale to residential purchasers, because it was located in an area with a "critical shortage" of affordable housing. Pet. App. 18a. Home ownership is one of the five explicit purposes for which ceded land (or proceeds from the sale of such land) may be used pursuant to Section 5 of the Admission Act. *See* p. 5, *supra*.

In 1989, HFDC filed a petition with the Land Use Commission to reclassify the parcel from agricultural to urban use. Pet. App. 20a. The Commission granted the petition, with respondent OHA's approval, in 1990. *Id.* As the Land Use Commission observed, the "proposed project on the Property is intended to carry out the State of Hawaii's overall goal of increasing housing opportunities in West Maui for persons and families of all income levels. ... The Property can accommodate up to 4,800 residential units. The residential units will be comprised of single family dwellings and lots, multifamily townhouse units and vacant lots." Trial Exhibit "OO" at 9-10.

For the next four years, OHA and HFDC tried to agree on the compensation due to OHA when the State transferred the land to HFDC. Pet. App. 20a-21a. In 1992, the Hawaii legislature established that OHA

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[5] In 1997, the Hawaii legislature merged HFDC with the public housing agency to form the Housing and Community Development Corporation of Hawaii (HCDCH), which is the captioned party in this case. 1997 Haw. Sess. L. Act 350, § 1, at 1010-1011; Haw. Rev. Stat. ch. 201G (2001). HFDC was spun off as a separate agency again in 2006. *See* 2006 Haw. Sess. L. Act 180, § 2, at 709; 2007 Haw. Sess. L. Act 249, § 2, at 777-806 (codified at Haw. Rev. Stat. chs. 201H, 356D).

would receive 20 percent of the fair market value of the land to be transferred. 1992 Haw. Sess. L. Act 318, at 1016. The parties, however, disputed the parcel's fair market value. While this negotiation continued, HFDC spent $31 million developing the parcel, including building roads, hooking up utilities, and grading the lots. Pet. App. 22a.

After the Apology Resolution was enacted in 1993, OHA demanded, for the first time, that HFDC attach a disclaimer to the Leiali'i transfer stating that the conveyance would not waive or diminish Native Hawaiian claims to ownership of the land. Pet. App. 21a. HFDC rejected this proposed disclaimer on the ground that it would have "rendered title insurance unavailable" for the land and thus would have undermined the interests of would-be homeowners. *Id.*[6] On November 4, 1994, HFDC purchased the land from the State for consideration of $1.00 and transmitted a check to OHA for $5,573,604.40, which was 20 percent of the fair market value OHA had previously said it would consider accepting. *Id.* OHA refused the check.

b. Respondent OHA filed this suit on November 4, 1994, and the individual plaintiffs (also respondents here) filed a separate suit on November 9, 1994. The cases were consolidated shortly thereafter.

In their First Amended Complaint, filed in 1995, respondents claimed that the State's proposed land dispositions would violate the trust obligations in the fed-

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[6] Subsequent events have confirmed the validity of this concern. "After institution of this lawsuit in November 1994, ... title insurance companies refused to insure title to the lands at Le[i]ali'i. Therefore, the development of Le[i]ali'i has been on hold because of th[e] lawsuit." Pet. App. 208a (footnote omitted).

eral Admission Act as well as various provisions of state law. *See* J.A. 34a-40a. Respondents' position soon evolved to focus heavily on the Apology Resolution as the main basis for their breach-of-trust claims.

In particular, respondents argued that the Apology Resolution "changed the legal landscape" (Pet. App. 27a) by casting doubt on whether, in the Admission Act, Congress had passed valid title to the State. Respondents contended that "the State's title is only as good as the title the United States had at the time of admission," and that "[a]s of 1993, the United States has admitted that this land was illegally obtained." Private Pls.' Opp. to Summ. J. 11, Cir. Ct. Record on Appeal (ROA), Volume (V.) 5, at 11 (Apr. 29, 1998). Respondents thus claimed that, although Section 5(f) of the Admission Act includes all Hawaii citizens as potential beneficiaries of ceded lands revenues, the Apology Resolution "serve[s] as notice ... that the [Native] Hawaiian beneficiaries may have a claim to the ceded lands that the non-[Native] Hawaiian beneficiaries do not enjoy and that such claim is likely to result in title to at least some of the ceded lands being vested in a sovereign [Native] Hawaiian entity." Private Pls.' Proposed Findings of Fact and Conclusions of Law 48, ROA V. 12, at 50 (Nov. 5, 2001). To preserve the lands for that purpose, respondents requested (i) an injunction prohibiting the State from selling any ceded lands and (ii) an injunction barring the sale of the Leiali'i parcel specifically.

After a bench trial in November and December 2001, the trial court ruled for the State on grounds of waiver, collateral estoppel, sovereign immunity, ripeness, and the political question doctrine. *See* Pet. App. 133a-279a. It also held that the State had the authority to transfer the ceded lands, concluding (among other

things) that in "adopting the Apology Resolution ... Congress did not create a 'claim' to any ceded lands." *Id.* at 258a. On February 3, 2003, the trial court certified its judgment as final pursuant to Hawaii Rule of Civil Procedure 54(b).

c. Respondents appealed to the Hawaii Supreme Court. Like their trial court arguments, respondents' claims on appeal were "based largely on the Apology Resolution." Pet. App. 27a. Respondent OHA argued, for example, that—

- "[t]he *crucial event* affecting OHA's legal position on the sale of the Ceded Lands was the passage of the Apology Resolution in November 1993" (J.A. 134a) (OHA Haw. S. Ct. Reply Br.) (emphasis added);
- by enacting the Apology Resolution "Congress ... *caused the change in the legal regime* that governs these lands" (*id.* at 113a) (emphasis added); and
- the Apology Resolution "*transform[ed] the legal landscape* and alter[ed] the relationship of the parties" (*id.* at 116a) (emphasis added).[7]

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[7] *See also* OHA Hawaii S. Ct. Opening Br. 3 ("OHA's lawyers and other lawyers advised OHA's Trustees that Congress's explicit recognition of Native Hawaiian claims placed a cloud on any title of any Ceded Lands transferred by the State into private hands."); *id.* at 45 ("OHA's position regarding the protection of these Native Hawaiian financial interests and cultural rights in the Ceded Lands changed after November 1993 with the passage by Congress of the Apology Resolution."); *id.* at 46 (OHA's position "matured ... after the Congress explicitly recognized the illegal action and uncompensated takings that occurred in the 1890s."); J.A. 104a ("This Congressional recognition of illegality, and its accompanying call for a 'reconciliation' through a process now un-

In effect, respondents argued once more that the Apology Resolution disavows Congress's prior decisions (i) to recognize the Republic of Hawaii and accept its cession to the United States of absolute title to the these lands (the Newlands Resolution) and (ii) to convey that title to the new State of Hawaii upon its statehood (the Admission Act). Respondent OHA elaborated that "[o]nce Congress identified the cloud on the title to these lands resulting from the illegalities surrounding their transfer to the United States, it became inevitable that a hold should be put on these lands until the legal issues can be sorted out properly." J.A. 126a. In particular, OHA submitted that this "hold" was necessary "so that a subsequent transfer can take place" from the State to "the rightful owners" (*i.e.*, Native Hawaiians). *Id.* at 116a. And OHA further contended that the State would violate its trust obligations to Native Hawaiians if it "transfer[red] property whose ownership has been put into question by federal enactments"—specifically, by the Apology Resolution. *Id.* at 118a-119a.[8]

d. On January 31, 2008, nearly twenty years after HFDC first filed its petition to reclassify the Leiali'i

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derway, has changed the legal landscape and restructured the rights and obligations of the State.") (footnote omitted).

[8] The private plaintiffs made similar arguments. *See* Private Pls.' Haw. S. Ct. Opening Br. 22 ("Given the admission in the Apology Resolution that the overthrow was 'illegal,' it is important to analyze what a trustee is to do when he or she learns that the trust *res* may have been illegally obtained."); *id.* at 32 ("[T]he Apology Resolution is law. It ... manifests the settlor's intent, it describes changed circumstances and it includes admissions that [Native] Hawaiians have an unrelinquished claim to the ceded lands.") (footnote omitted).

parcel, the Hawaii Supreme Court issued its decision. Pet. App. 1a-100a.[9] The court articulated the primary question on appeal as "whether, in light of the Apology Resolution, [the] court should issue an injunction to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the [Native] Hawaiian people to the ceded lands are resolved." *Id.* at 79a; *see id.* at 8a n.7 ("[U]ltimately, [N]ative Hawaiians seek return of [the ceded lands] from both the state and federal governments.") (internal brackets and quotation marks omitted). The court answered that question in the affirmative.

The court first construed the text of the Apology Resolution to recognize the "unrelinquished claims" that Native Hawaiians have asserted in the lands at issue. Pet. App. 32a. From this, the court inferred that the Apology Resolution subjects the State to a new and specific fiduciary duty to preserve the lands until some unspecified future date. The court found support for this interpretation in Congress's statement that it intended "to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.* (quoting 107 Stat. at 1513) (emphasis omitted). On these grounds, the court enjoined the State from transferring any of the ceded lands, including the Leiali'i parcel, "pending a reconciliation between the United States and the [N]ative Hawaiian

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[9] As noted in our letter to the Clerk of July 14, 2008, the reprint of the court's opinion contains a format error: the block-quoted text on the top of page 6a of the petition appendix should actually appear as the second paragraph in footnote 5 at the bottom of the previous page.

people" and "until the claims of the [N]ative Hawaiians to the ceded lands have been resolved." *Id.* at 85a, 100a. It did not set out a standard for determining what type or extent of "reconciliation" would be sufficient to warrant lifting the injunction. It held only that "injunctive relief is proper pending final resolution of [N]ative Hawaiian claims through the political process." *Id.* at 98a.

The Hawaii Supreme Court stressed that its decision rested primarily on its construction of the federal Apology Resolution. *See* Pet. App. 26a ("At the heart of the plaintiffs' claims ... is the Apology Resolution."); *id.* at 79a ("The primary question ... is whether, in light of the Apology Resolution, this court should issue an injunction.") (emphasis omitted); *id.* at 85a ("[T]he language of the Apology Resolution itself supports the issuance of an injunction."); *id.* ("[T]he Apology Resolution dictates that the ceded lands should be preserved."). Indeed, at three separate points in its opinion, the court emphasized that respondents' cause of action arose from the Apology Resolution and could not have been brought until that Resolution was enacted. *See id.* at 58a-59a, 62a-63a, 99a; *see also* Part I, *infra* (discussing these passages).

The court invoked several state law provisions as well—most of them enacted before the Apology Resolution supposedly gave rise to plaintiffs' claims—but only as ancillary support for its judgment. *See* Pet. App. 35a-39a. None of these provisions purports to curb the State's general authority to dispose of the ceded lands.[10] Instead, these provisions relate to this

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[10] *See* Respondents' Br. in Opp. to Cert. ("Opp.") App. 1a-27a (reprinting these statutes). The only one of these state law provi-

case only in the attenuated sense that they criticize the overthrow of the Hawaiian monarchy, voice general support for Native Hawaiians, and recite the undisputed fact that "[m]any native Hawaiians *believe*" that they have a legal claim either to the ceded lands or to "monetary reparations." *Id.* at 35a-38a (quoting 1993 Haw. Sess. L. Act 354, § 1) (some emphasis omitted); *see also* 1997 Haw. Sess. L. Act 329, § 1 (resolving questions about OHA's funding and endorsing "momentum" toward reconciliation with native Hawaiians); 1993 Haw. Sess. L. Act 359 (reciting various historical findings, "acknowledg[ing] and recogniz[ing] the unique status [of] the native Hawaiian people," calling for a convention of native Hawaiians on self-government issues, setting up an advisory commission and various task forces, and appropriating funds for that purpose).

SUMMARY OF ARGUMENT

1. Although respondents contended otherwise in opposing certiorari, this Court clearly has jurisdiction to review the Hawaii Supreme Court's decision. First, under *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court has jurisdiction whenever a state court decision appears to rest primarily on federal law, or to be interwoven with federal law, and it contains no "plain statement" that it rests on adequate and independent

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sions that even arguably requires the State to hold *any* lands for a future "native Hawaiian entity" is 1993 Haw. Sess. L. Act 340, which is narrowly limited to land on a former military target range: Kaho'olawe island. *See* Pet. App. 38a-39a. That land, which the United States conveyed 35 years *after* the Admission Act, constitutes only 2 percent of the land owned by the State, whereas the lands at issue in this case constitute nearly *all* State-owned lands. *See* note 2, *supra*.

state law grounds. That is the case here. The Hawaii Supreme Court held that the Apology Resolution "dictates" the injunction under review here (Pet. App. 85a) and, indeed, stressed repeatedly that respondents' claims arise from the Resolution and could not have been raised before its enactment in 1993.

In any event, the Hawaii Supreme Court's injunction rests on a legal premise foreclosed by federal law: namely, that Native Hawaiian claims to the ceded lands may have survived Hawaii's annexation to the United States and that the lands should thus be preserved pending resolution of that title dispute. This premise contradicts multiple congressional enactments from the Newlands Resolution to the Admission Act, and any state court decision resting on that premise violates the Supremacy Clause. Although respondents may disagree on the merits, this Court plainly has jurisdiction to address that federal law dispute.

2. On the merits, the Apology Resolution is a straightforward statement of regret. It does not affect the legal status of the ceded lands, much less "cloud[]" the State's title or "change[] the legal landscape and restructure[] the rights and obligations of the State" (Pet. App. 26a-27a). For example, although the Resolution recites that Native Hawaiians "never directly relinquished their claims ... over their national lands," Pet. App. 15a, it does not repeal Congress's 1898 decision to extinguish such claims; it simply apologizes for the role of certain U.S. officials in the overthrow of the Hawaiian monarchy. The text of the Apology Resolution is quite clear on this point, as is the legislative history, which confirms that the Resolution "will not result in any changes in existing law." S. Rep. No. 103-126, at 35 (1993).

The Hawaii Supreme Court's ruling is untenable not only because it misreads the Apology Resolution, but also because, in violation of the Supremacy Clause, its rationale contradicts preexisting congressional enactments, whose legal effect the Apology Resolution left intact. The court enjoined any sales of the ceded lands on the theory that title might actually belong not to the State, but to "the Native Hawaiian people." But that legal theory runs headlong into the Newlands Resolution, which vests absolute and unreviewable title in the United States; the Organic Act of 1900, which confirms the extinguishment of any Native Hawaiian or other claims to the ceded lands; and the Admission Act of 1959, which transfers to the State the same absolute title previously held by the United States. This body of federal law forecloses any competing claims to the ceded lands, such as those respondents present here. It similarly bars any judicial remedy that, like this injunction, is premised on the possible validity of such competing claims.

Respondents have suggested that, even if the Apology Resolution did not *repeal* these prior federal enactments, its recitation of certain historical facts permits them now to challenge the enactments' underlying validity as a matter of international or constitutional law. There is no merit to such arguments. As this Court has long recognized, Congress has absolute and judicially unreviewable authority to extinguish, with or without just compensation, communal claims to public lands brought on behalf of an entire native group. At the same time, Native Hawaiians have a clear *moral* basis for asking the political branches to grant them recompense, and both Congress and the State have responded by implementing programs for their specific benefit. But Native Hawaiians have no

legal claim to the ceded lands that federal law permits any court to recognize.

Finally, construing the Apology Resolution to "cloud" the title to the ceded lands, as the Hawaii Supreme Court did, would raise profound concerns about the Resolution's own constitutionality. Under basic principles of federalism, Congress may not grant lands to a State upon admitting it to the Union and thereafter impair the State's title to those lands or force the State to use them to implement a previously unannounced federal objective. That, however, is exactly what the Hawaii Supreme Court construed the Apology Resolution to do. Even if that construction were plausible in the first place, which it is not, it should be rejected under the doctrine of constitutional avoidance.

ARGUMENT

The decision under review violates federal law in two related respects. First, it erroneously concludes that the Apology Resolution impairs the State's prerogative to dispose of its own lands in the manner it deems best for its citizens as a whole. The Apology Resolution does no such thing. Second, the decision under review rests on a premise—*i.e.*, Native Hawaiians have legal claims to the ceded lands—that directly contradicts the Newlands Resolution and subsequent federal enactments. Nothing in the Apology Resolution repeals the preclusive effect of those prior enactments on claims of Native Hawaiian title.

Because respondents' opposition to certiorari focused almost exclusively on a challenge to this Court's jurisdiction, however, we briefly address that issue before proceeding to the merits.

I. THIS COURT HAS JURISDICTION

This Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983); *see also Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984) ("If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law."). In opposing certiorari, respondents claimed (Opp. 11) that the decision below was primarily based not on the Apology Resolution, but on preexisting state trust law and four state enactments, even though none of those enactments even purports to curb the State's authority to dispose of the ceded lands. *See* pp. 16-17 and note 10, *supra*. That argument is wrong in two main respects.

First, the Hawaii Supreme Court did not even suggest that its decision rested on adequate and independent state law grounds, let alone make the "plain statement" to that effect needed to defeat the *Michigan* v. *Long* presumption of jurisdiction. 463 U.S. at 1040.[11]

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[11] The Hawaii Supreme Court is familiar with the *Michigan* v. *Long* presumption and has often shielded its decisions from this Court's review by explicitly relying on state law rather than federal law. *See, e.g.*, *State* v. *Heapy*, 151 P.3d 764, 772 n.7 (Haw. 2007) (plurality opinion) (citing *Michigan* v. *Long* and specifying that "[t]he analysis in this opinion is grounded in ... the Hawai'i Constitution"); *State* v. *Lessary*, 865 P.2d 150, 154 (Haw. 1994) ("When the United States Supreme Court's interpretation of a

To the contrary, at three separate points in its opinion, the court emphasized that "it was not until the Apology Resolution was signed into law on November 23, 1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was *not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis.*" Pet. App. 62a-63a (emphasis added); *accord id.* at 58a-59a, 99a. As respondents have acknowledged, the Apology Resolution "was enacted *after* three of the four Hawaii laws at issue in the case." Opp. 2 (emphasis added). If the Hawaii Supreme Court had deemed these state law grounds independent of the Apology Resolution and adequate to support the judgment, it would not have concluded that respondents' cause of action did not even "ar[i]se" until the later-enacted Apology Resolution was signed.[12]

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provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protections as a matter of state constitutional law."); *State* v. *Bonnell*, 856 P.2d 1265, 1272 & n.1 (Haw. 1993) ("[b]ecause we resolve the present appeal on state constitutional grounds, we need not (and do not) decide whether a federal constitutional violation has occurred"; "as 'the ultimate judicial tribunal in this state,' this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution"). That practice provides further confirmation that the court's decision here does *not* rest on adequate and independent state law grounds.

[12] The one state statute enacted after the Apology Resolution, 1997 Haw. Sess. L. Act 329, did not purport to limit the State's disposition of the ceded lands; it merely clarified OHA's share of ceded-land revenues and endorsed continued "momentum" toward reconciliation with Native Hawaiians, while noting the political "controversy" surrounding disposition of the ceded lands and other matters. *Id.* § 1. The Hawaii Supreme Court did

If further proof were needed on this point, the Hawaii Supreme Court amply supplied it. The court began by observing that "[a]t the *heart of plaintiffs' claims* ... is the Apology Resolution," that "plaintiffs' current claim for injunctive relief is ... *based largely upon the Apology Resolution*," and that this claim presupposes that the Resolution "*changed the legal landscape* and restructured the rights and obligations of the State." Pet. App. 26a-27a (emphasis added; internal quotation marks omitted). Then, in holding for respondents, the court agreed that "[t]he *primary question* before this court on appeal is whether, *in light of the Apology Resolution*, this court should issue an injunction" against sale of the trust lands, and it concluded that "*the Apology Resolution dictates* that the ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people." *Id.* at 79a, 85a (emphasis added, alteration in original omitted).

This conclusion of the Hawaii Supreme Court—that federal law "dictates" the injunction under review—not only confirms this Court's jurisdiction, but underscores why this Court's intervention is critical. By relying on federal law, the Hawaii Supreme Court effectively in-

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not suggest that Act 329 had any special significance among the other state law provisions. To the contrary, it repeatedly lumped them all together in the phrase "the Apology Resolution and ... *related state legislation*." *E.g.*, Pet. App. 41a (emphasis added). Indeed, any specific reliance on Act 329 as a basis for judicial intervention would have been most anomalous, given that this statute admonished the state courts that "the issues currently under litigation" should "be addressed within and remain under the control of the executive and legislative branches of state government as essentially political questions." 1997 Haw. Sess. L. Act 329, § 1.

sulated its decision from state-level political checks because, under the Supremacy Clause, its federal law holding would presumably trump any state law response. This Court should review and reverse that holding to free the state-level political process from the distorting influence of an "erroneous view of what [federal law] requires." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995).[13]

Second, this Court has jurisdiction not only because the decision under review relies primarily (and unjustifiably) on the Apology Resolution, but also because it affirmatively conflicts with the Newlands Resolution and related federal enactments in violation of the Supremacy Clause. As discussed in Part II.B below, the Hawaii Supreme Court enjoined any sale of the ceded lands because it found that the Apology Resolution had clouded the State's title to those lands by recognizing claims of competing Native Hawaiian title. But as a matter of federal law, the Newlands Resolution vested absolute title to the ceded lands in the United States (which Congress later transferred to the State) and thereby foreclosed any claim of preexisting or compet-

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[13] *See generally* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1510 (1987) (where "a state court [has] intentionally muddled the state and federal questions in order to prevent [the] state's democratic branches from recognizing their power to alter the result," Supreme Court "[d]eference to the state court on that basis parodies true deference to the state"); Ruth Bader Ginsburg, *Book Review*, 92 Harv. L. Rev. 340, 343-344 (1978) (arguing that state courts should not be permitted to escape review by the Supreme Court when they "curb[] state officials" by relying on "federal law determination[s] that could not be overturned by [the State's] legislature or electorate" and are thus "virtually beyond the reach of democratic politics").

ing Native Hawaiian title. Thus, even if the Hawaii Supreme Court *had* relied primarily on state law for the "cloud on the title" rationale underlying this injunction, its decision still would have *contradicted federal law* unless the Apology Resolution somehow repealed the Newlands Resolution, which it did not do. In all events, any dispute on that point is plainly within this Court's jurisdiction to decide. *See Three Affiliated Tribes*, 467 U.S. at 152 (Supreme Court has jurisdiction to hear claims that state court has "construed state law broadly in the belief that federal law poses no barrier to the exercise of state authority").[14]

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[14] For reasons discussed more fully in our petition-stage reply brief (at 6-8), this Court would have jurisdiction even if the decision below *did* rest on adequate and independent state law grounds and even if those state law grounds were consistent with federal law. Unlike the parties in a typical *Michigan* v. *Long* case, these parties have antagonistic interests in the resolution of the federal-law issue quite apart from how any state law issues are resolved. If affirmed, the state court's interpretation of the Apology Resolution would, as discussed, obstruct state-level efforts to restore the State's land-transfer authority. Petitioners thus have a concrete interest in securing removal of this federal-law obstacle to state-level political checks. Respondents have a strong competing interest in *sustaining* the Hawaii Supreme Court's conclusion that "the [federal] Apology Resolution ... dictates" the result below (Pet. App. 85a), no matter how state law is amended. That continuing adversity of interest precludes any concern that this Court could issue an "advisory opinion" by resolving the federal issues presented. *See Florida* v. *Meyers*, 466 U.S. 380, 381-382 n.* (1984) (final paragraph) ("even if [there was] an independent state ground for reversal [of a conviction], we would still be empowered to review" the federal issue because "there is no possibility that our opinion will be merely advisory," given its potential to affect subsequent proceedings).

II. FEDERAL LAW PRESERVES THE STATE'S SOVEREIGN AUTHORITY TO DISPOSE OF THE CEDED LANDS IN ACCORDANCE WITH THE ADMISSION ACT

For decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its "public trust" obligations, which run to *all* the citizens of Hawaii, not just to Native Hawaiians. *See* Admission Act, § 5(f); *Rice*, 528 U.S. at 525 (Breyer, J. concurring) ("[T]he Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii.") (emphasis in original). Both the federal Admission Act and state law contemplate that, as is common in such arrangements, the State will discharge its trust obligations by selling some of the ceded lands and using the proceeds to benefit its citizens.[15] For example, both the Act and the state constitution direct the State to use these lands to promote private "farm and home *ownership* on as widespread a basis as possible." Pet. App. 116a (Admission Act; emphasis added); *accord* Haw. Const. art. XI, § 10 (same language); *see Big Island Small Ranchers Ass'n* v. *State*, 588 P.2d 430, 435 (Haw. 1978) (this language "refers expressly to farm and home [o]wnership and not leaseholds"). And both the Admission Act and state law direct the State to use income from, and the "proceeds from the *sale*" of, the ceded lands to fund any of five broad categories of public programs. Pet. App. 116a (emphasis added); *accord* Haw. Rev. Stat. § 171-18. As noted, many of those

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[15] *See generally Alabama* v. *Schmidt*, 232 U.S. 168, 174 (1914) ("[E]ven in honor [the trust] would not be broken by a sale and substitution of a fund ... a course, we believe, that has not been uncommon among the states."); *see, e.g., Lassen* v. *Arizona*, 385 U.S. 458, 466-467 (1967).

revenues are used to fund programs for native Hawaiians, including the operations of respondent OHA.[16]

This dispute arose when the State tried to sell a small portion of the ceded lands for residential purposes, including affordable housing for needy individuals, and thereby promote "home ownership on as widespread a basis as possible." The Hawaii Supreme Court has indefinitely enjoined that and all similar state initiatives on the ground that the Apology Resolution has "clouded" the State's title to the ceded lands by recognizing competing claims based on pre-annexation Native Hawaiian title. That rationale both misconstrues the Apology Resolution itself, as discussed in Part II.A below, and contradicts the Newlands Resolution and subsequent federal enactments, as discussed in Part II.B. And as discussed in Part II.C, if there were any doubt on these points, it should be resolved in the State's favor in order to avoid the severe constitutional concerns that would arise if Congress were deemed to have impaired Hawaii's title to these lands after the State's admission to the Union.

A. The Hawaii Supreme Court's Interpretation Of The Apology Resolution Conflicts With The Resolution's Express Terms

The Apology Resolution acknowledges the wrongs Native Hawaiians suffered as a result of the 1893 overthrow and recognizes a federal commitment to recon-

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[16] At the certiorari stage, the Pacific Legal Foundation, relying on *Rice* v. *Cayetano*, 528 U.S. 495 (2000), filed an amicus brief challenging the constitutionality of any governmental program directed to Native Hawaiians. As we noted in our petition-stage reply brief (at 9-10 n.4), that issue is not before this Court because it was neither raised in nor decided by the state courts in this case.

ciliation. But the Resolution does not mandate, justify, or even contemplate the imposition of new limits on Hawaii's sovereign authority to sell, exchange, or transfer its lands for any of the purposes identified in the Admission Act. The Hawaii Supreme Court thus had no basis for invoking this federal provision to abrogate the State's core sovereign authority over its own lands.

Interpretation of the Apology Resolution begins with its text. *See, e.g., Nebraska Dep't of Revenue* v. *Loewenstein*, 513 U.S. 123, 128 (1994); *Ann Arbor R.R. Co.* v. *United States*, 281 U.S. 658, 666 (1930) (interpreting a joint resolution under the standard rules of statutory construction). After a succession of "whereas" clauses that recount historical events, the Resolution contains seven operative paragraphs. The first five, which compose Section 1, list the elements of Congress's "acknowledgment and apology" to "Native Hawaiians." Then, in one paragraph apiece, Section 2 defines "Native Hawaiians," and Section 3 provides a savings clause for "settlement of claims" against the United States.

The Resolution serves two purposes: "To *acknowledge* the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and *to offer an apology* to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." Pet. App. 101a (emphasis added). The Resolution does not address the State's trust obligations, let alone restrict the State's preexisting and explicit authority both to transfer land out of the trust and to dispose of "the proceeds from the sale" of such land (Admission Act § 5(f) (Pet. App. 116a)) for any of the five purposes set forth in the Admission Act. Indeed, nothing in the Resolution alters *any* of the State's legal rights or obli-

gations in any respect. The Resolution does recite that Native Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." Pet. App. 15a. But while the Resolution apologizes "for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States," it does not repeal (or apologize for) Congress's enactment of the Newlands Resolution, which (i) recognized the Republic of Hawaii as the government of Hawaii, (ii) ratified the "cession" of the lands in question by the Republic to the United States, and (iii) vested title to the lands in the United States. App. 1a.

The Section 3 disclaimer provides no support for respondents' position, despite the Hawaii Supreme Court's contrary suggestion (Pet. App. 33a-34a). Indeed, the disclaimer cuts against respondents' position. In its entirety, Section 3 states: "Nothing in [the Resolution] is intended to serve as a settlement of any claims against the United States." At most, this savings clause reassured anyone with any type of claim against the United States that he or she was no *worse off* after the Resolution was enacted than before. If Congress had intended to alter substantive rights in favor of such claimants, it would have done so explicitly in the text of the Resolution—as it has done in other "apology" enactments. *See, e.g.*, Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989 Appx.) (acknowledging and apologizing "for the evacuation, relocation and internment" of Japanese citizens during World War II and providing $20,000 in restitution to each eligible individual).

In short, by construing this Resolution to curtail the State's sovereign authority over its lands, the Hawaii Supreme Court violated every court's duty when construing federal law to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Finally, the legislative history and subsequent judicial interpretation confirm that the Apology Resolution leaves substantive rights unaltered. For example, the Senate Report accompanying the Resolution states emphatically that this enactment "will not result in any changes in existing law." *See* S. Rep. No. 103-126, at 35 (1993); *see also* 139 Cong. Rec. S14477, S14482 (daily ed. Oct. 27, 1993) (remarks of Sen. Inouye) ("[T]his is a simple resolution of apology, to recognize the facts as they were 100 years ago."); 139 Cong. Rec. E2898, E2898 (daily ed. Nov. 15, 1993) (remarks of Sen. Richardson) (Apology Resolution "does not infer any new rights to native Hawaiians"). And until the Hawaii Supreme Court's decision here, each court that had addressed the question had agreed that the Apology Resolution is simply an apology—and not a source of substantive rights or obligations. *See Rice* v. *Cayetano*, 941 F. Supp. 1529, 1546 n.24 (D. Haw. 1996) ("[The Apology Resolution] did not create any substantive rights .... The Apology Bill creates no specific Native Hawaiian rights."), *rev'd on other grounds*, 528 U.S. 495 (2000); Pet. App. 175a (trial court decision) ("[B]y its terms, the 1993 Apology Resolution does not ... itself create a claim, right or cause of action."); *see also Rice* v. *Cayetano*, 528 U.S. 495, 505 (2000) (referring to the Resolution simply as an acknowledgment and apology).

B. Federal Law Bars Any "Cloud On The Title" Theory As A Basis For Restricting Sales Of The Ceded Lands, Whether Under The Apology Resolution Or State Law

The Hawaii Supreme Court's ruling rests not only on a misreading of the Apology Resolution, but also on a legal rationale foreclosed by the Newlands Resolution: namely, that Native Hawaiians may have legal title to the ceded lands that an injunction is needed to protect (pending the "reconciliation process" or otherwise). In the Newlands Resolution, Congress extinguished any such title as a matter of federal law by accepting the Republic's cession of these lands and by vesting absolute title to (and ownership of) these lands in the United States. And, contrary to the Hawaii Supreme Court's conclusion, the Apology Resolution did not somehow revive or recognize any such title. The Newlands Resolution and similar federal enactments thus preclude any injunctive relief—whether based on federal or state law—that is designed, as the current injunction is, to preserve possible Native Hawaiian claims of legal title. As a matter of federal law, no such title exists, and any state law theory to the contrary violates the Supremacy Clause.

1. Federal Law, In The Form Of The Newlands Resolution And Subsequent Congressional Enactments, Bars Any Claim Of Native Hawaiian Title

Although respondents have conceded that "the acknowledgment of wrongdoing [in the Apology Resolution] may not by itself create any substantive rights," they have insisted that "it nonetheless transforms the legal landscape and alters the relationship of the parties." J.A. 116a (internal quotation marks omitted). In particular, they argued below that, "[o]nce Congress

identified the *cloud on the title* to these lands resulting from the illegalities surrounding their transfer to the United States, it became inevitable that a hold should be put on these lands until the legal issues can be sorted out properly." *Id.* at 126a (emphasis added). Respondents noted that the Hawaii Supreme Court had previously ruled that "the political branches," rather than that court itself, would ultimately bring this title dispute to a final resolution. *Id.* at 128a. But respondents urged the court to justify its own intervention in the meantime by finding that there is "substantial support for the conclusion that Native Hawaiians ... have complete and perfect title to the Ceded Lands." *Id.*[17] On that basis, respondents asked the court to conclude that Hawaii, as trustee of the ceded lands, would violate its trust obligations if it "transfer[red] property whose *ownership has been put into question by federal enactments*." *Id.* at 118a-119a (emphasis added). Respondents concluded: "Just as a person who knowingly possesses stolen goods is not free to alienate those

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[17] Respondents contend that, in fact, "the Native Hawaiian people were and remain the ultimate owners of the trust corpus." OHA Supp. S.J. Opp. 9, ROA V. 3, at 26 (Mar. 27, 1996); *accord* OHA Settlement Conf. Statement 3, ROA V. 7, at 114 (Nov. 18, 1998) ("the State of Hawaii does not have good, marketable title to the ceded lands," and any "sale or transfer would constitute an illegal conversion of lands because the [Native] Hawaiian people are the rightful owners of the ceded lands"); Private Pls.' Haw. S. Ct. Opening Br. 26 ("Although the State, as trustee, may have been granted the power to sell ceded lands, ... the State has a duty not to exercise that power if such sale is illegal," and, "[i]f the United States illegally acquired the ceded lands, the State would violate [that duty] if it sold ceded lands."); *id.* at 30 (arguing that, until the Apology Resolution was enacted, "Congress probably was not prepared to admit that the overthrow [of the Hawaiian monarchy] was illegal").

goods, but must try to return them to their rightful owner, the State is no longer free to transfer or sell the Ceded Lands." *Id.* at 136a.

The Hawaii Supreme Court adopted this "cloud on the title" argument as the basis for issuing its injunction: "[W]e believe, based on a plain reading of the Apology Resolution, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation[.]" Pet. App. 85a. The court noted that, "[w]ithout an injunction, the ceded lands are at risk of being alienated." *Id.* And the court thus entered an injunction out of concern that "once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians" to relief from the State, *id.*, which could take the form of "monetary payment[s]," "transfer of lands," and "the creation of a sovereign [Native] Hawaiian nation," *id.* at 88a.[18]

This injunction violates federal law, and thus the Supremacy Clause, because the court's "unrelinquished claims" rationale conflicts with prior federal enactments confirming that Native Hawaiians have no claims to the ceded lands that are cognizable in any court.

The first and most important of these enactments was the Newlands Resolution of 1898, which annexed Hawaii to the United States. As discussed, that Reso-

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[18] *Accord* Pet. App. 26a (noting respondents' position that "the title to the ceded lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished their claims over their ancestral territory").

lution recognized the Republic of Hawaii; accepted the cession "and transfer to the United States [of] the absolute fee and ownership of all public, Government [and] Crown lands"; and declared that all "property and rights" in the ceded lands had become "vested in the United States of America." App. 1a; *see Fasi* v. *King (Land Commissioner)*, 41 Haw. 461, 466 (1956) ("[U]pon annexation, all public lands in Hawaii became the property of the United States."); *see also Territory of Hawaii* v. *Mankichi*, 190 U.S. 197, 214 (1903) (noting that one of the Resolution's "main objects" was to "accept the cession of the islands ... made by the Republic of Hawaii"). Anticipating the trust obligations that Congress imposed six decades later in the Admission Act, the Newlands Resolution directed that "all revenue from or proceeds of" those lands, with certain exceptions, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." App. 1a-2a. That statutory directive concerning the *use* of these lands comported with—indeed, presupposed—complete and unqualified federal *ownership* of these lands.

Congress thereafter enacted multiple statutes confirming that the United States had assumed perfect title to the ceded lands and could use or dispose of them as it deemed appropriate.[19] For example, when it cre-

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[19] Shortly after the Newlands Resolution was enacted, the Executive Branch similarly concluded that the United States had assumed "absolute fee and ownership" of the ceded lands, 22 Op. Att'y Gen. 574, 576 (1899), and that the vestigial Republic of Hawaii was "without any power whatever to convey" to any third parties "the legal or equitable title of the United States," 22 Op. Att'y Gen. 627, 632 (1899). *See also* Exec. Order of Sept. 11, 1899, *reprinted in* James D. Richardson, *A Compilation of the Messages*

ated a territorial government for Hawaii in the Organic Act of 1900, Congress reaffirmed that the ceded lands had been "transferred to the United States" under the Newlands Resolution, and it delegated rights of "possession, use, and control" of those lands to the government of "the Territory of Hawaii." Act to Provide a Government for the Territory of Hawaii, Ch. 339, § 91, 31 Stat. 141, 159 (1900) (App. 5a); *see generally Wilson* v. *Shaw*, 204 U.S. 24, 32 (1907) (when Congress enacts legislation "based on the title of the United States," including "one to provide a temporary government," that assertion of title "is conclusive upon the courts").

Specific provisions within the Organic Act confirm Congress's determination that the United States could hold or alienate the ceded lands. Those lands fall into two basic categories. The first are "crown" lands, which, under Kingdom of Hawaii law, the monarchy could use and occupy but not alienate.[20] The second are "government" lands, which consisted of the other public lands of the Kingdom. Section 99 of the Organic Act "hereby declared" that, before annexation, all such lands were "the property of the Hawaiian government, ... free and clear from ... all claim of any nature whatsoever"—and that those lands therefore became, after

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and Papers of the Presidents, 1789-1902, 369-370 (1900) (providing that any sale of land by the Republic of Hawaii after passage of the Newlands Resolution was null and void).

[20] *See generally Liliuokalani* v. *United States*, 45 Ct. Cl. 418, 428 (1910) ("The reservations made were to the Crown and not the King as an individual. The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the [United States] as part and parcel of the public domain.").

cession and annexation, federal lands "*subject to alienation*" by the United States. *Id.* § 99, 31 Stat. 141, 161 (emphasis added) (App. 5a); *see also* note 25, *infra*.

This provision supports two conclusions. First, Congress recognized that the ceded lands as a whole—including all "crown" lands, which would henceforth be treated like the "government" lands—should be deemed "free and clear from ... all claim of any nature whatsoever," including the types of claims respondents raise here. Second, Congress found that "alienation" of such lands was entirely appropriate. Section 73 of the Organic Act also recognizes that the territorial government would alienate ceded lands for agricultural uses and directs it to use "[a]ll funds arising from the *sale* ... of such lands ... for the benefit of the inhabitants of the Territory of Hawaii," as anticipated under the Newlands Resolution. App. 4a (emphasis added).

Similar conclusions also follow from subsequent amendments to the Organic Act. In 1921, Congress defined the term "public lands" as it appears in the Act to mean "all lands in the Territory of Hawaii [previously] classed as government or crown lands," except (among other qualifications) "lands to which the United States has relinquished the absolute fee and ownership." Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 304, 42 Stat. 108, 116 (1921) (App. 6a). That proviso would have been nonsensical if the United States had never obtained "absolute fee and ownership" of the ceded lands to begin with. Congress drove this point home when, in 1952, it amended the Organic Act to authorize "*sales of Government lands*" even "for business uses" whenever the relevant territorial official deemed "such sale ... to be in the interest of the development of the community or area in which said lands are located." Act to Amend Section 73(1) of the Hawaiian Organic

Act, Pub. L. No. 82-483, 66 Stat. 515, 515-516 (App. 7a) (emphasis added); *see* H.R. Rep. No. 82-1120, at 1 (1952) (explaining that "[t]he present law," which the amendment revises, "is restrictive in that it does not permit the sale of public lands for ... uses which would tend to aid the economic conduct of modern business"). Like Section 99 of the Organic Act, this provision underscores Congress's determination that federal law not only permitted, but often affirmatively encouraged, "sales" of ceded lands to private parties.

The Admission Act, passed in 1959, reaffirmed these same conclusions. Congress there "grant[ed] to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property" within Hawaii, defined as "the lands and properties that were ceded to the United States by the Republic of Hawaii" under the Newlands Resolution. Admission Act § 5(b), (g) (Pet. App. 115a, 117a).[21] Because the United States' own title was perfect and unchallengeable, the Admission Act transferred perfect and unchallengeable title to the State, unencumbered by any competing legal claims brought by Native Hawaiians or anyone else.

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[21] The Admission Act made an exception for those ceded lands under the direct control of the federal government, such as military bases. Admission Act § 5(d) (Pet. App. 115a-116a). If the Apology Resolution placed a "cloud on the title" of the ceded lands owned by the State, it would presumably also place a "cloud on the title" of the ceded lands retained by the federal government—and, under the logic of the Hawaii Supreme Court's decision, would apparently bar the federal government from selling such lands until it reaches its own "political resolution" with Native Hawaiians. *See* Pet. App. 8a n.7 ("[U]ltimately, [N]ative Hawaiians seek return of [the ceded lands] from both the state and federal governments.") (internal quotation marks and brackets omitted).

Just as Congress had imposed various trust obligations on other States upon their admission to the Union, *see, e.g.*, *Lassen* v. *Arizona*, 385 U.S. 458, 460 & n.2 (1967), the Admission Act required the State to use the ceded lands, and the proceeds from their sale or other disposition, to promote one or more of the five trust objectives listed in Section 5(f). Again, in its description of those objectives, "the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii," not just Native Hawaiians. *Rice*, 528 U.S. at 525 (Breyer, J. concurring) (emphasis in original). And, as discussed, the Admission Act reaffirms that alienation of ceded lands comports with the State's trust obligations under Section 5(f) and is indeed necessary to fulfill one of Section 5(f)'s purposes. *See* p. 5, *supra*.

The only remaining question is whether, as the Hawaii Supreme Court believed, the Apology Resolution repealed all of these prior enactments *sub silentio*, recognized competing claims, and placed a "cloud" on Hawaii's title to the ceded lands. The Apology Resolution did no such thing. As discussed in Part II.A, it is a symbolic enactment that *apologizes* for the role of U.S. officials in the 1893 overthrow of the Hawaiian monarchy. The Resolution "does not result in *any* changes in existing law," S. Rep. No. 103-126, at 35 (1993) (emphasis added), let alone repeal Congress's 1898 assertion of perfect and unchallengeable title to the ceded lands and its 1959 transfer of that title to the State. *See generally Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 18-19 ("[A] general statement of 'findings' ... is

too thin a reed to support the rights and obligations read into it by the court below.").[22]

Finally, legislation enacted *after* the Apology Resolution provides yet further confirmation of these same points. In 1994, just one year after the Apology Resolution, Congress enacted the Native Hawaiian Education Act, Pub. L. No. 103-382, § 9202, 108 Stat. 3518 (1994) (NHEA), which provides various educational benefits to Native Hawaiians. In this legislation, Congress expressly found:

> In 1898, [the Newlands Resolution] *ceded absolute title of all lands held by the Republic of Hawai'i, including the government and crown lands of the former Kingdom of Hawai'i, to the United States,* but mandated that revenue generated from these lands be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

20 U.S.C. § 7512(6) (emphasis added). If, in the Apology Resolution, Congress had meant to repeal the preclusive effect of the Newlands Resolution on claims of preexisting Native Hawaiian title to the ceded lands, it would not have made this finding one year later, reaffirming that Congress could and did take "absolute title" to those lands from the congressionally recognized Republic of Hawaii. Nor would Congress have used this same language (as it did) when it reenacted the

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[22] Indeed, as discussed in Part II.C below, Congress would lack constitutional authority to impair the State's title to this land after granting the State free and clear title upon its admission to the Union.

NHEA in 2002. *See* Pub. L. No. 107-110, § 7202, 115 Stat. 1425 (2002).

2. Congress's Foreclosure Of Native Hawaiian Land Claims Is Not Subject To Judicial Invalidation

Respondents have suggested that, even if the Apology Resolution did not by its terms *repeal* Congress's 1898 decision to eliminate any competing claims of title to the ceded lands, it nonetheless endorsed historical propositions that support a new legal challenge to that decision. For example, invoking the Apology Resolution's recitation of facts, respondents argue that the United States "illegally" overthrew "the Kingdom of Hawai'i ... in violation of international law." J.A. 115a (internal quotation marks omitted); *see also* Private Pls.' Mem. in Opp. to State's Mot. to Dismiss 10, ROA V. 5, at 10 (April 29, 1998) ("[A]t trial, Plaintiffs will put on historical evidence to establish that the overthrow was illegal, the ceded lands were illegally obtained, and [Native] Hawaiians never relinquished their claims to ceded lands.").

No matter what the historical record might show, however, nothing in "international law" or any other body of jurisprudence permits any court to invalidate the Newlands Resolution's preclusive effect on any and all claims of preexisting or competing title. First, it is well established that, in cases of conflict, specific federal statutes trump preexisting treaties and principles of customary international law.[23] Thus, even if respon-

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[23] *See Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) ("[A]n Act of Congress ... is on a full parity with a treaty, and ... when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty

dents were correct in contending that the Newlands Resolution's abrogation of any Native Hawaiian title conflicted with international law in 1898, that conflict would have no bearing on the Resolution's legal validity in U.S. courts.

Nor could respondents have any plausible basis for a judicial challenge to the Newlands Resolution under the Takings Clause or any other constitutional provision. For the purpose of assessing challenges to the Newlands Resolution, a Native Hawaiian polity could have stood in no stronger legal position than the sovereign Indian nations that were displaced or dispossessed by American expansion in the 19th century. As this Court has repeatedly held, "[t]he power of Congress" to extinguish "Indian title based on aboriginal possession ... is supreme. The manner, method and time of such extinguishment raise political not justiciable issues." *United States* v. *Santa Fe Pacific R.R. Co.*, 314 U.S.

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null.") (first ellipsis in original) (quoting *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("[I]f there be any conflict between the stipulations of [a] treaty and the requirements of the law, the latter must control."). Similarly, "Congress may enact laws superseding 'the law of nations' " and "is not bound by international law." *United States* v. *Yousef*, 327 F.3d 56, 109 n.44 (2d Cir. 2003) (quoting, *inter alia*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)); *accord Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004) (courts may "cautiously" consult principles of customary international law "[w]here there is no treaty, and no controlling executive or *legislative act* or judicial decision" on point) (emphasis added) (quoting in part *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *Tag* v. *Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959) ("There is no power in this Court to declare null and void a statute adopted by Congress ... merely on the ground that such provision violates a principle of international law.") (citing, *inter alia*, *The Paquete Habana*).

339, 347 (1941); *accord Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281 (1955); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 587-588 (1823). Similarly, this Court has "long ... held that the taking by the United States of 'unrecognized' or 'aboriginal' Indian title is not compensable under the Fifth Amendment." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 415 n.29 (1980) (quoting *Tee Hit-Ton*, 328 U.S. at 285).[24]

These principles apply with greatest force in the context presented here: *congressional* extinguishment of land claims now asserted on behalf of indigenous *groups*. Perhaps there might once have been a plausible basis for a just compensation claim against the *United States* if, counterfactually, (i) Executive Branch officials alone rather than Congress had asserted title for the United States; (ii) the land claims arose from a congressionally recognized property right; and (iii) the case involved claims of private title by individual owners rather than public title by Native Hawaiians as a group. All three of those factors are missing here. First, *Congress*, rather than errant federal officials acting alone, extinguished any pre-annexation title to the ceded lands. Second, the claims do not derive from any plausible assertion of federal statutory entitlement. Finally, respondents assert title to these lands in the aggregate on behalf of "the Native Hawaiian people" *as*

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[24] *See also Territory* v. *Kapiolani Estate, Ltd.*, 18 Haw. 640, 645-646 (1908) ("The validity of the declaration in the constitution of the Republic of Hawaii, under which the present title is derived, does not present a judicial question. Even assuming, but in no way admitting, that the constitutional declaration was confiscatory in its nature, this court has no authority to declare it to be invalid. The subsequent derivation of the title by the United States, as above stated, is clear.").

a whole; they do not assert just compensation claims on the basis of any individual's private title to specific parcels of land.[25]

Each of these three considerations individually suffices to distinguish this case from *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), on which the Hawaii Supreme Court erroneously relied (Pet. App. 95a-98a). In *Lane*, this Court concluded that Executive Branch officials could not simply "confiscat[e]" land belonging to an incorporated town (the Pueblo) in southern Arizona if, as alleged, the town had "complete and perfect title" to the land and Congress preserved that title in the Gadsden Treaty. 249 U.S. at 113; *see also id.* at 112

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[25] *Compare Carino* v. *Insular Gov't of Philippine Islands*, 212 U.S. 449, 459-460 (1909) (invoking property rights guaranteed by federal statute to reject effort of government officials to occupy a 370-acre farm in the Philippines that, "as far back as testimony or memory goes ... has been held by individuals under a claim of private ownership," such that "it will be presumed ... never to have been public land"), *with Tee-Hit-Ton Indians*, 348 U.S. at 284-285 n.18 (upholding congressional abrogation of Native Alaskan land claims and distinguishing *Carino* on the ground, among others, that it involved claims of private title to a single farm rather than a "communal claim to a vast uncultivated area"). There could never have been a valid claim of private title to these lands in the first place, because the "ceded lands" to which the United States acquired "absolute fee and ownership" under the Newlands Resolution had been public "[g]overnment" and "[c]rown" lands. App. 1a; *see generally Liliuokalani*, 45 Ct. Cl. 418 (1910) (holding that Queen Lili'uokalani never owned personal fee simple title to "crown lands" under pre-1893 Hawaiian law; that Section 99 of the Organic Act divested any personal interest she might once have had (*see* pp. 35-36, *supra*); and that the statute of limitations barred any just compensation claim arising from that divestiture). In any event, the statute of limitations on just compensation claims relating to the Newlands Resolution expired more than 100 years ago. *See* 28 U.S.C. § 2501.

(noting that Congress had "provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be ... capable of suing or defending in respect of such lands").

This case is the reverse of *Lane* in all pertinent respects. In *Lane* the plaintiffs claimed that Executive Branch officials were wrongdoers in that they had defied the will of Congress, whereas here respondents claim that Congress itself was the wrongdoer in recognizing the Republic of Hawaii and enacting the Newlands Resolution. In *Lane*, this Court assumed that Congress had *preserved* claims of preexisting title, whereas here there is no question that Congress acted to *foreclose* such claims. Finally, the Pueblo in *Lane* was exercising its statutory right to sue as a "body corporate" (*id.*) in defense of its title to specific lands it occupied, whereas here respondents dispute title to 1.2 million acres of public lands on behalf of the "Native Hawaiian people" as a whole, wherever they may currently live, on the theory that Native Hawaiians "were and remain the ultimate owners of the trust corpus." OHA Supp. S.J. Opp. 9, ROA V. 3, at 26 (Mar. 27, 1996); *see also* Private Pls.' Proposed Findings of Fact and Conclusions of Law 48, ROA V. 12, at 50 (Nov. 5, 2001) (predicting that title to "at least some" of the lands will eventually be vested in a "sovereign [Native] Hawaiian entity.").

In short, this Court's precedent forecloses any *legal* theory that, like respondents', assumes that Congress acted wrongfully or "illegally" (J.A. 115a) when it took absolute title to the ceded lands for the United States, a measure that necessarily extinguished any competing Native Hawaiian claims to the same lands. Whether another nation "has just cause of complaint" for its past

treatment by Congress, and whether "our country was justified in its legislation, are not matters for judicial cognizance.... Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will." *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *see* note 23, *supra*.

Similarly, while Native Hawaiians, like other wronged and displaced peoples, have strong *moral* claims on the political branches of government for recompense, the courts have no role to play in determining whether Congress should have made different or additional provision for Native Hawaiians to compensate them for their grave losses. If "[g]enerous provision has been willingly made to allow [indigenous peoples] to recover for wrongs" perpetrated by the United States, it has been "as a matter of grace, not because of legal liability." *Tee-Hit-Ton Indians*, 348 U.S. at 281-282. We do not argue here that congressional provision *has* been sufficiently generous. Our point is rather that such determinations have never been and are not now for the courts to make.

The political branches of Hawaii's state government have discretion, within broad limits imposed by federal law, to take native Hawaiian interests into account in fulfilling their trust responsibilities under Section 5(f) of the Admission Act. The State has indeed promoted such interests by, among other things, using proceeds from the ceded lands to subsidize the operations of respondent OHA, which reports that its assets traceable to the ceded lands reached almost half a billion dollars as of mid-2007. *See* p. 7, *supra*. And Hawaii's political branches could further decide, for example, that they will not alienate specified ceded lands if they conclude that those lands are properly preserved

for "the betterment of the conditions of native Hawaiians" rather than, for example, "the development of ... home ownership on as widespread a basis as possible." Admission Act, § 5(f) (Pet. App. 116a). But neither the Apology Resolution nor any other source of law, state or federal, authorizes any court to tell Hawaii's political branches that they *may not* alienate those lands on the theory that Native Hawaiians may have enforceable legal rights to them. The Newlands Resolution and subsequent federal enactments confirm that no such rights exist, and the Supremacy Clause precludes any court decision based on a contrary premise.[26]

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[26] Even apart from this point, the Admission Act also imposes independent constraints on a state court's authority to restrict the State's use and disposition of the ceded lands in accordance with the Act's purposes. "[A]t least at the outer limits federal law must act as a barrier beyond which the State cannot go in its administration of the ceded lands pursuant to section 5(f)." *Price* v. *Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990); *see generally Lassen* v. *Arizona*, 385 U.S. 458 (1967); *Branson School Dist.* v. *Romer*, 161 F.3d 619, 633-643 (10th Cir. 1998). For example, a state court could violate the Admission Act if it disregards "the constitution and laws" of Hawaii (Pet. App. 116a)—which *permit* sales of ceded lands (*see* p. 6, *supra*)—by categorically *prohibiting* such sales even when they are deemed necessary to promote the Act's trust objectives. Likewise, any such judicial bar on such sales would need to be analyzed in light of the "purposes of Congress" (*Lassen*, 385 U.S. at 467) in admitting Hawaii, "which ha[d] been an integral, 'incorporated' part of the United States for 60 years, into the Union as a full and equal sovereign state." S. Rep. No. 86-80, Rep. of the S. Comm. on Interior and Insular Affairs Regarding the Hawaii Admission Act, *reprinted in* 1959 U.S.C.C.A.N. 1346, at 1. These federal law constraints would bind the Hawaii state courts in any proceedings on remand from this Court, as would the independent Supremacy Clause constraint (discussed in the text) against any injunction based on Native Hawaiian land claims that have been

C. The Doctrine Of Constitutional Avoidance Requires Reversal

Finally, even if there *were* some basis for construing the Apology Resolution to place a "cloud on the title" to the ceded lands, any such construction would violate the rule of constitutional avoidance. It is a "cardinal principle" of statutory interpretation that, when Congress's intent is ambiguous, courts should construe statutes to avoid interpretations that would raise "grave and doubtful constitutional questions." *Harris* v. *United States*, 536 U.S. 545, 555 (2002). Here, even if Congress's intent were ambiguous, the Apology Resolution should be interpreted to leave the State's sovereign authority over its lands intact, because otherwise the Resolution would raise grave constitutional concerns.

In 1959, Congress invited Hawaii to join the Union on the premise that the new State would receive the federal government's absolute title to the ceded lands and, along with that title, discretion to make use of the lands as it deemed best, so long as it promoted one or more of the five objectives set forth in Section 5(f) of the Admission Act. Congress underscored the centrality of this land grant to the new State's sovereign identity by providing that the lands were offered "in lieu of any and all grants provided for [other] new States." Admission Act § 5(b) (Pet. App. 115a). The people of Hawaii embraced this specific arrangement when they voted overwhelmingly for statehood later in 1959. Indeed, the Admission Act made statehood contingent on a majority vote in favor of a ballot proposition that

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foreclosed by the Newlands Resolution and later federal enactments.

"[a]ll provisions of the [Admission Act] ... prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people." *Id.* § 7(b) (Pet. App. 118a-119a).

Under the Hawaii Supreme Court's view of the Apology Resolution, Congress took from the State in 1993 what it gave in 1959—it placed a cloud on the title to property that it had previously conveyed free and clear of all claims, and it "dictate[d]" (Pet. App. 85a) that the State relinquish its core prerogative to realize the value of that property through sale. Congress has no authority to "dictate" any such thing.

First, the Constitution bars Congress from trying to rescind property rights that a State previously assumed upon its admission to the Union. In particular, as this Court has explained, Congress may not "grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render those conditions more onerous." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 632 (1989); *accord Idaho* v. *United States*, 533 U.S. 262, 280 n.9 (2001) ("Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State.") (quoting *Shively* v. *Bowlby*, 152 U.S. 1, 26-28 (1894) (alteration in original)); *id.* at 284 (Rehnquist, C.J., dissenting) (same). Enforcement of that constitutional principle is particularly critical here, where the hypothetically rescinded property rights encompass not just (for example) an isolated riverbed, but virtually *all* public land within the State and nearly a third of the State's total land mass. *See generally Coyle* v. *Smith*, 221 U.S. 559, 579 (1911) (striking down federal legislation dictating location of

state capital as violation of state's "jurisdictional sovereignty").

Indeed, far lesser intrusions on state property, while not Tenth Amendment violations in themselves, would trigger the federal government's Fifth Amendment obligation to provide just compensation to the State. *See Block* v. *North Dakota*, 461 U.S. 273, 291 (1983); *United States* v. *Carmack*, 329 U.S. 230, 241 (1946); *see also Isaak* v. *Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999) ("Property is not merely the ownership and possession of land .... It also embraces the unrestricted right to use, enjoy and dispose of lands.... Anything [that] destroys any of these elements of property, to that extent destroys the property itself."). Nothing in the Apology Resolution suggests that Congress wished to make the federal Treasury potentially liable to Hawaii for impairing its title to these lands, and the Resolution should be construed to avoid the risk of such liability. *See Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 2004).

Finally, if the Hawaii Supreme Court's interpretation were correct, the Apology Resolution would violate federalism principles in another respect as well. As noted, the court found that the Resolution "dictate[d]" an indefinite moratorium on the sale of ceded lands in order to promote a "reconciliation" process between the State and Native Hawaiian groups. Pet. App. 85a. Although the State has long engaged in productive dialogue with Native Hawaiian groups, Congress has no constitutional authority to force it to do so. Any such federal compulsion would flout the Tenth Amendment ban on federal actions that "compel the States to implement ... federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997); *accord New York* v. *United States*, 505 U.S. 144, 188 (1992).

Courts must "assume Congress does not exercise lightly" its limited powers to legislate in areas traditionally reserved to the States. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, no federal law should be construed to intrude in such areas unless, at a minimum, Congress includes a "clear and manifest" statement that it intends to interfere with traditional state prerogatives. *Id.* at 461 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Apology Resolution contains no such "clear and manifest" statement. Indeed, it contains no hint that Congress wished to diminish the State's authority over the ceded lands in any respect at all. The Hawaii Supreme Court's injunction rests on a contrary premise and thus violates federal law.

CONCLUSION

The judgment of the Hawaii Supreme Court should be vacated and the case remanded with instructions to dissolve the injunction against the sale, transfer, or exchange of the ceded lands.

Respectfully submitted.

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DECEMBER 2008

APPENDIX

APPENDIX

Joint Resolution To Provide For Annexing The Hawaiian Islands To The United States, Res. No. 55-55, 30 Stat. 750 (1898) ("Newlands Resolution")

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds from the same, except as regards such part thereof as may

be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the Unites States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs law and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of

the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved, July 7, 1989

Act To Provide A Government For The Territory Of Hawaii, Ch. 339, 31 Stat. 141 (1900) ("Organic Act") (Excerpts)

* * * * *

SEC. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent;" "commission of public lands" for "minister of interior," "agent of public lands," and "commissioners of public lands," or their equivalents; and the words "that I am a citizen of the United States," or "that I have declared my intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," or "that I have received a certificate of special right of citizenship from the Republic of Hawaii." And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale ~~or lease~~ or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent

with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided*, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order, or orders, by the President of the United States.

* * * * *

SEC. 91. That the public property ceded and tranferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by the direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii.

* * * * *

SEC. 99. That the portion of the public domain heretofore known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.

* * * * *

Hawaiian Homes Commission Act, 1920,
Pub. L. No. 67-34, 42 Stat. 108 (1921)
(Excerpt)

* * * * *

SEC. 304. The first, second, and third paragraphs of section 73 of the Hawaiian Organic Act are hereby amended to read as follows:

"SEC. 73. (a) That when used in this section—

"(1) The term 'commissioner' means the commissioner of public lands of the Territory of Hawaii;

"(2) The term 'land board' means the board of public lands, as provided in subdivision (1) of this section;

"(3) The term 'public lands' includes all lands in the Territory of Hawaii classed as government or crown lands previous to August 15, 1895, or acquired by the government upon or subsequent to such date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; except (1) lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, (2) lands set apart or reserved by Executive order by the President, (3) lands set aside or withdrawn by the governor under the provisions of subdivision (g) of this section, (4) sites of public buildings, lands used for roads, streets, landings, nurseries, parks, tracts reserved for forest growth or conservation of water supply, or other public purposes, and (5) lands to which the United States has relinquished the absolute fee and ownership, unless subsequently placed under the control of the commissioner and given the status of public lands in accordance with the provisions of this Act, the Hawaiian Homes Commission Act, 1920, or the Revised Laws of Hawaii of 1915[.]"

* * * * *

Pub. L. No. 82-483, 66 Stat. 515 (1952)
(Excerpt)

AN ACT

To amend section 73 (1) of the Hawaiian Organic Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 73 (1) of the Hawaiian Organic Act is hereby amended by amending the first proviso of the second sentence thereof to read as follows: "*Provided, however,* That the commissioner shall, with the approval of said board, sell to any citizen of the United States, or to any person who has legally declared his intention to become a citizen, for residence purposes lots and tracts, not exceeding three acres in area; and that sales of Government lands or any interest therein may be made upon the approval of said board for business uses or other undertakings or uses, except those which are primarily agricultural in character, whenever such sale is deemed to be in the interest of the development of the community or area in which said lands are located, and all such sales shall be limited to the amount actually necessary for the economical conduct of such business use or other undertaking or use[.]"

* * * * *

RESPONDENT'S BRIEF

120

(16)

No. 07-1372

In the Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii strips the State of Hawaii of its authority to sell lands ceded to it by the federal government until it reaches a political settlement with Native Hawaiians about the status of those lands.

PARTIES TO THE PROCEEDING

Petitioners are the State of Hawaii; Linda Lingle, Governor of Hawaii; the Hawaii Housing Finance and Development Corporation (HFDC); Karen Seddon, Executive Director of HFDC; and Georgina Kawamura, Charles King, Betty Lou Larson, David Lawrence, Theodore E. Liu, Allan Los Banos Jr., Ralph Mesick, Linda Smith, and Richard Toledo Jr., Members of the Board of Directors of HFDC.

Respondents are the Office of Hawaiian Affairs; Rowena Akana, Haunani Apoliona, Donald Cataluna, Walter Meheula Heen, Robert K. Lindsey Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender, and John Waihe'e IV, Members of the Board of Trustees of the Office of Hawaiian Affairs; Pia Thomas Aluli; Jonathan Kamakawiwo'ole Osorio; Charles Ka'ai'ai; and Keoki Maka Kamaka Ki'ili.

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In the Supreme Court of the United States

No. 07-1372

STATE OF HAWAII, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Hawaii Supreme Court (Pet. App. 1a-100a) is reported at 177 P.3d 884. The opinion of the trial court (Pet. App. 133a-279a) is unreported.

JURISDICTION

The opinion of the Hawaii Supreme Court was filed on January 31, 2008, and judgment was entered on March 24, 2008. The petition for a writ of certiorari was filed on April 29, 2008, and granted on October 1, 2008. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1257. For the reasons stated below, however, the Court lacks jurisdiction, and the petition should therefore be dismissed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510 (1993), is reproduced at Pet. App. 103a-111a. Article XII, Sections 4 to 7, and Article XVI, Section 7, of the Hawaii Constitution are reproduced in the appendix to this brief (App., *infra*, 1a-3a). Other relevant provisions of state law are reproduced at J.A. 19a-27a and Br. in Opp. 1a-27a.

STATEMENT

Respondents brought suit against petitioners in Hawaii state court, claiming, *inter alia*, that the prospective sale of a parcel of land by a state agency to a private property developer would violate the State's fiduciary duty to Native Hawaiians under Article XII, Section 4, of the Hawaii Constitution. After a bench trial, the trial court entered judgment in favor of petitioners. Pet. App. 133a-279a. The Hawaii Supreme Court vacated and remanded, directing the trial court to enjoin petitioners from selling the parcel of land at issue, or any other lands ceded to the federal government at annexation and subsequently transferred to the State, until the claims of Native Hawaiians to those lands have been resolved by the Hawaii Legislature. *Id.* at 1a-100a.[1]

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[1] Like the Hawaii Supreme Court (and Congress in the Apology Resolution), this brief uses the phrase "Native Hawaiian" to refer to "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Pet. App. 6a (erroneously reproducing footnote in text); 177 P.3d at 892 n.5 (quoting Apology Resolution § 2, 107 Stat. 1513). As discussed elsewhere in this brief,

A. Historical Background

This Court will be familiar with the complex and sometimes turbulent history leading up to the creation of the State of Hawaii. See *Rice* v. *Cayetano*, 528 U.S. 495, 499-511 (2000). Only the most salient points of that history are recounted here.

1. The first inhabitants reached the Hawaiian Islands more than 1500 years ago. By 1778, when Captain James Cook became the first westerner to land on the islands, the indigenous Hawaiians had developed a sophisticated society and culture of their own, structured around a system of communal land tenure (with individual chiefs controlling, but not owning, units of land known as *ahupua'a*). When King Kamehameha I united the islands in a single kingdom in 1810, he retained the preexisting system of communal land tenure, with the King effectively serving as trustee and managing the land for the benefit of the chiefs and the people in common. See *Rice*, 528 U.S. at 500-501; *Napeahi* v. *Paty*, 921 F.2d 897, 899 (9th Cir. 1990), cert. denied, 502 U.S. 901 (1991); *State ex rel. Kobayashi* v. *Zimring*, 566 P.2d 725, 729 (Haw. 1977); Pet. App. 144a; *Cohen's Handbook of Federal Indian Law* § 4.07[4][b], at 365-366 (2005 & Supp. 2007) (Cohen).

In the years that followed, the Kingdom of Hawaii was recognized as a sovereign nation by, and entered into treaties with, the United States and the broader international community. At the same time, however, western settlers began to arrive on the islands, and those

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see, *e.g.*, p. 49, *infra*, some provisions of federal and state law define the phrase more narrowly. The parties agree that no question concerning the propriety of that definition is before this Court. See Pet. Br. 7 n.4.

settlers demanded western-style property rights for the lands they occupied. In the mid-1840s, King Kamehameha III acquiesced, transferring a substantial portion of the Hawaiian lands to chiefs and other private parties and dividing the remaining lands into "crown" lands (held in trust by the monarch) and "government" lands. Although the private land awards were initially made subject to the rights of Native Hawaiian tenants, those lands largely came under the control of western settlers in the ensuing years. See *Rice*, 528 U.S. at 501-504; *Napeahi*, 921 F.2d at 899; *Zimring*, 566 P.2d at 730; Pet. App. 144a-145a; Cohen § 4.07[4][b], at 366-368.

In the late 1800s, tensions intensified between western settlers and the government of the Kingdom of Hawaii. In 1893, United States Minister to Hawaii John Stevens, acting with the assistance of the American military, conspired with a group of western settlers to overthrow Queen Lili'uokalani and replace the monarchy with a provisional government. That government later established the Republic of Hawaii. President Cleveland condemned the insurrection and called for the restoration of the monarchy. See *Rice*, 528 U.S. at 504-505; Pet. App. 146a-151a; H.R. Rep. No. 243, 53d Cong., 2d Sess. 3-14 (1893).

2. The federal government's approach changed radically following the election of 1896. President McKinley opened negotiations with the Republic of Hawaii and reached agreement on a treaty of annexation. The Senate refused to pass the treaty by the required two-thirds majority. See *Rice*, 528 U.S. at 505; Pet. App. 151a-152a. Supporters of annexation then sought to achieve the annexation of Hawaii through a joint resolution instead. That resolution, known as the Newlands Resolution, passed both houses by simple majorities and was signed into law by President McKinley. See Hawaiian Annexa-

tion Joint Resolution (Newlands Resolution), Res. No. 55, 30 Stat. 750 (1898). In its preamble, the Newlands Resolution provided that the government of the Republic of Hawaii would "cede * * * to the United States the absolute fee and ownership of all public * * * lands," including both "crown" and "government" lands and totaling approximately 1.8 million acres. *Id.*, Preamble, 30 Stat. 750. At the same time, the resolution provided that all revenue from ceded lands, except for those lands used for governmental purposes, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* § 1, 30 Stat. 750. From the outset, therefore, it was understood that the Newlands Resolution had "subject[ed] the public lands in Hawaii to a special trust" for the benefit of the Hawaiian people. 22 Op. Att'y Gen. 574, 576 (1899).

Although the federal government claimed title to the ceded lands, it held those lands separately from other lands it owned, and the territorial government largely continued to administer the ceded lands itself. See Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 141, 159 (1900). The federal government did set aside approximately 200,000 acres of the ceded lands for the purpose of leasing those lands to Native Hawaiians. See Hawaiian Homes Commission Act, 1920, ch. 42, §§ 203, 207, 42 Stat. 108, 109, 110 (1921).

3. On August 21, 1959, Hawaii became the fiftieth State in the Union. Pursuant to the act of admission, the federal government transferred title to approximately 1.2 million acres of the ceded lands to the State of Hawaii (in addition to the lands it had previously set aside for Native Hawaiian use), while retaining title over the remainder for federal use. See Hawaii Statehood Admission Act (Admission Act), Pub. L. No. 86-3, § 5(b)-(c), 73 Stat. 4, 5-6 (1959) (48 U.S.C. ch. 3 note); Pet. App. 155a-

156a. The Admission Act specified that the State was required to "manage[] and dispose[] of [its share of the ceded lands] for one or more of [five] purposes in such manner as the constitution and laws of [the] State may provide": namely, (1) "for the support of the public schools and other public educational institutions"; (2) "for the betterment of the conditions of native Hawaiians"; (3) "for the development of farm and home ownership on as widespread a basis as possible"; (4) "for the making of public improvements"; and (5) "for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6. The Admission Act also provided that the federal government could bring suit for breach of trust if the lands were "use[d] for any other object." *Ibid.*

4. For the first two decades after admission, the State devoted virtually all of the revenue from the ceded-lands trust to the support of public educational institutions, with little (if any) of the revenue going to the betterment of the conditions of Native Hawaiians. See *Rice*, 528 U.S. at 508. In 1978, however, the State convened its second Constitutional Convention, out of which emerged numerous constitutional provisions concerning the welfare of Native Hawaiians. Of particular relevance here, the new provisions expressly specified that the ceded lands transferred to the State at admission "shall be held by the State as a public trust for native Hawaiians and the general public," Haw. Const. Art. XII, § 4, and that any legislation enacted by the Hawaii Legislature concerning the State's trust obligations "shall not diminish or limit the benefits of native Hawaiians" under the foregoing provision, *id.* Art. XVI, § 7. The new provisions also established the Office of Hawaiian Affairs (OHA), *id.* Art. XII, § 5, which has the responsibilities, *inter alia*, to "manage and administer * * * all income and proceeds" allocated to Native Hawaiians from the ceded-

lands trust and to "exercise control over real and personal property set aside by state, federal or private sources" for Native Hawaiians, *id.* Art. XII, § 6.[2]

Following the 1978 Constitutional Convention, the Hawaii Legislature enacted a statute providing that OHA was entitled to receive 20% of the revenue from the ceded-lands trust, to be used on behalf of Native Hawaiians. See Haw. Rev. Stat. § 10-13.5. In a series of subsequent cases, OHA brought suit against the State and various state officials, contending that the State was failing to comply with its obligations under that statute. See *Trustees of the Office of Hawaiian Affairs* v. *Yamasaki*, 737 P.2d 446 (Haw.), cert. denied, 484 U.S. 898 (1987); *Office of Hawaiian Affairs* v. *State*, 31 P.3d 901 (Haw. 2001) (*OHA I*); *Office of Hawaiian Affairs* v. *State*, 133 P.3d 767 (Haw. 2006) (*OHA II*). Although the Hawaii Supreme Court ultimately held that those disputes were nonjusticiable, it repeatedly emphasized that "the State's obligation to native Hawaiians is firmly established in our constitution" and that, under the relevant constitutional provisions, it was "incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust." *OHA I*, 31 P.3d at 914; see *OHA II*, 133 P.3d at 795.

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[2] OHA is overseen by a nine-member board of trustees. See Haw. Rev. Stat. § 10-4. In *Rice*, this Court invalidated, as violative of the Fifteenth Amendment, a constitutional provision that permitted only Native Hawaiians to vote in elections for OHA trustees, see 528 U.S. at 524, and all registered voters are now eligible to vote in OHA elections, see Haw. Rev. Stat. § 13D-3. The parties agree that no similar constitutional questions are before the Court in this case. See Pet. Br. 27 n.16.

B. The Reconciliation Process

Since the 1990s, Native Hawaiians have been engaged in a process of reconciliation with the State of Hawaii and the federal government, with the goal of finally resolving the grievances of Native Hawaiians arising from the overthrow of the Kingdom of Hawaii. That reconciliation process consists of two parts: (1) an effort to obtain additional recognition for Native Hawaiians as a native people and (2) an effort to resolve the claims of Native Hawaiians to the lands that were ceded to the federal government in the aftermath of the overthrow. This case concerns the latter of those efforts.

1. In April 1993, the Hawaii Legislature marked the 100th anniversary of the overthrow of the Kingdom of Hawaii by passing a concurrent resolution requesting that Congress and the President issue a formal apology for the involvement of the federal government in the overthrow. See 1993 Haw. H.R. Con. Res. No. 179. That resolution recounted at length the history leading up to the creation of the State of Hawaii. See *ibid.* In particular, the resolution contained findings (1) that the overthrow of the Hawaiian kingdom was "illegal"; (2) that "the indigenous Hawaiian people never directly relinquished their claims * * * over their national lands to the United States"; and (3) that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land." *Ibid.* The resolution urged the federal government to "support reconciliation efforts between the United States and the Native Hawaiian people." *Ibid.*

A few months later, Congress passed, and the President signed, the Apology Resolution. That resolution tracked, almost verbatim, the findings of the Hawaii Legislature's joint resolution, including the findings that "the indigenous Hawaiian people never directly relin-

quished their claims * * * over their national lands to the United States" and that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land." Preamble, 107 Stat. 1512. The Apology Resolution also contained a finding that it would be "proper and timely" for Congress to "support the reconciliation efforts of the State of Hawaii * * * with Native Hawaiians." Preamble, 107 Stat. 1513. In the operative provisions of the Apology Resolution, Congress acknowledged that the overthrow of the Hawaiian Kingdom was "illegal"; apologized for the involvement of the federal government in the overthrow; and expressed its support for "reconciliation between the United States and the Native Hawaiian people." § 1, 107 Stat. 1513.

Around the same time, the Hawaii Legislature enacted a series of other statutes relating to the reconciliation process. The Legislature established the Hawaiian Sovereignty Advisory Commission to "facilitate the efforts of native Hawaiian people * * * to be govern[ed] by an indigenous sovereign nation of their own choosing," 1993 Haw. Sess. L. Act 359, § 2,[3] and authorized funding for programs to educate the public about Native Hawaiian sovereignty, 1993 Haw. Sess. L. Act 354, § 2. Perhaps most importantly, the Legislature provided that the Island of Kaho'olawe—one of the eight primary Hawaiian islands, which was in the process of being returned by the federal government to the State—would

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[3] In its final report, which it issued before the commencement of this litigation, the Hawaiian Sovereignty Advisory Commission recommended, *inter alia*, that the State adopt a moratorium on the sale of ceded lands "until a sovereign Hawaiian entity is established and recognized." Hawaiian Sovereignty Advisory Commission, Final Report 6 (Feb. 18, 1994).

be held as part of the ceded-land trust until such time as the federal and state governments recognized a "sovereign native Hawaiian entity," whereupon that entity would assume "management and control of the island and its waters." 1993 Haw. Sess. L. Act 340, § 2.

2. There have since been additional milestones in the reconciliation process. In 1997, the Hawaii Legislature set up a joint committee to "study and make recommendations on all outstanding and anticipated issues * * * currently or potentially relating to the public land trust," including "whether lands should be transferred to [OHA] in partial or full satisfaction of any past or future obligations" under the Hawaii Constitution. 1997 Haw. Sess. L. Act 329, § 3(a). In the same act, the Legislature noted that "the events of history relating to Hawaii and Native Hawaiians * * * continue to contribute today to a deep sense of injustice among many Native Hawaiians and others"; that the Hawaiian people desired a "lasting reconciliation"; that, "over the last few decades, the people of Hawaii, through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation"; and that the Legislature's goal was to "continue this momentum * * * toward a comprehensive, just, and lasting resolution." *Id.* § 1.

Although the claims of Native Hawaiians to the ceded lands have not been definitively resolved, there is considerable support on the state level for such a resolution. In 1998, Governor Cayetano pledged that he would "settle the ceded lands issue" before the end of his term in office. Benjamin J. Cayetano, *The Next Four Years: Completing the Vision*, Honolulu Advertiser, Oct. 16, 1998, at A-13. When he left office in 2002, he expressed regret for his inability to reach a definitive resolution of that issue. See Pat Omandan, *Governor Admits Failure*

Over OHA, Honolulu Star-Bulletin, Jan. 6, 2002, at A-6. Governor Cayetano's successor, Governor Lingle, likewise pledged to "resolve the ceded lands issue once and for all." Governor Linda Lingle, State of the State Speech (Jan. 21, 2003). She stressed that, "until we get [the ceded-lands issue] resolved[,] our community can never really come together as one." *Ibid.*[4]

C. Facts and Proceedings Below

Respondents, plaintiffs below, are OHA, its board members, and four Native Hawaiian individuals; petitioners, defendants below, are the State of Hawaii, Governor Lingle, the Hawaii Housing Finance and Development Corporation (HFDC), and its executive director and board members.

1. In the late 1980s, HFDC determined that it would be appropriate to use land from the ceded-lands trust—the so-called "Leiali'i parcel" in West Maui—for a large residential development.[6] Like other ceded lands, the

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[4] There is also considerable support for additional recognition of Native Hawaiians as a native people. Congress has been considering the Native Hawaiian Government Reorganization Act, popularly known as the Akaka Bill, which would "provide a process for the reorganization of the single Native Hawaiian governing entity * * * for purposes of continuing a government-to-government relationship," and authorize the federal government to enter into negotiations with that entity for the transfer of federal lands. H.R. 505, 110th Cong. §§ 4(b), 8(b) (2007); S. 310, 110th Cong. §§ 4(b), 8(b) (2007). In the last Congress, the Akaka Bill passed the House of Representatives but failed to attain the 60 votes required to invoke cloture in the Senate; it is expected to be reintroduced presently in the new Congress.

[6] While the development was to have contained some housing for Maui residents with incomes at or near the median, it was also to have contained other housing to be sold at "market" rates, and to have included an 18-hole golf course. See Pet. Trial Ex. LL.

Leiali'i parcel was then managed by the Hawaii Department of Land and Natural Resources (DLNR). By statute, OHA was entitled to 20% of the fair market value of the land upon its transfer to HFDC. See Haw. Rev. Stat. § 10-13.6. In light of the increasing momentum behind the reconciliation process, however, OHA was concerned that it would be sued if it accepted payment without a disclaimer preserving any claims of Native Hawaiians to the land. Accordingly, OHA proposed to include language in its agreement with HFDC indicating that, in accepting payment, it was "in no manner * * * waiv[ing] or otherwise act[ing] in furtherance or diminution of any claim the Hawaiian people may have in the land comprising the site of the Villages of Le[i]ali'i project." HFDC refused to include that language in the agreement. Notwithstanding the lack of an agreement with OHA, on November 4, 1994, DLNR transferred approximately 500 acres of the Leiali'i parcel to HFDC for $1. Pet. App. 18a-22a, 201a-208a.

2. That same day, OHA and its board members brought suit against petitioners in Hawaii Circuit Court, seeking to enjoin the sale of the Leiali'i parcel, or any other ceded lands held by the State, to private parties. The individual respondents filed a similar action a few days later, and later consolidated their claims with those of the official respondents. In the consolidated complaint, respondents claimed that the sale of the Leiali'i parcel, or any other ceded lands, would violate the State's fiduciary duty to Native Hawaiians under Article XII, Section 4, of the Hawaii Constitution, see J.A. 34a, 35a, and that the sale would cause irreparable harm because "alienation of the land to a third party w[ould] erode the public land trust and the entitlement of the

Native Hawaiian people," J.A. 35a; see also J.A. 36a (same).[6] Notably, the complaint made no claims under federal law; it cited the Apology Resolution only in the facts section. See J.A. 31a-32a.[7]

After a bench trial, the trial court entered judgment in favor of petitioners. Pet. App. 133a-279a. As is relevant here, the court concluded that "the sale of ceded lands at Leiali'i would not constitute a breach of trust." *Id.* at 226a. The court reasoned that "the Hawaii State Legislature has considerable discretion with respect to the handling of the ceded lands trust." *Id.* at 261a. "[S]ales of ceded lands," the court continued, "generally[] do not constitute a breach of trust," as long as "the State does not otherwise breach the high standards applicable to it as trustee." *Ibid.* While the court acknowledged that "the federal and state governments have recognized past injustices to native Hawaiians, and have expressed their support for native Hawaiian sovereignty and reconciliation," the court rejected the argument that the Apology Resolution (or state law) "constitute[d] changed circumstances that * * * would render any sale of ceded lands a breach of trust." *Id.* at 258a.

3. The Hawaii Supreme Court unanimously vacated and remanded, directing the trial court to enjoin peti-

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[6] Respondents also claimed, in the alternative, that HFDC had used an erroneously low assessment of the fair market value of the Leiali'i parcel for purposes of determining OHA's statutory entitlement to a share of that value. See J.A. 37a, 38a. Those claims remain pending in the trial court.

[7] Before trial, respondents moved for the trial court to take judicial notice of the "findings and operative provisions" of the Apology Resolution and various other federal and state laws. See 8/9/99 Official Resp. Mem. in Support of Mot. for Jud. Notice 1-2. The trial court granted the motion. See 8/31/00 Order 1.

tioners from selling the Leiali'i parcel, or any other ceded lands held by the State, until the claims of Native Hawaiians to those lands have been resolved by the Hawaii Legislature. Pet. App. 1a-100a.

As is relevant here, the Hawaii Supreme Court held that the trial court erred by rejecting petitioners' breach-of-fiduciary-duty claims. Pet. App. 27a-41a, 84a-88a. At the outset, the court noted that respondents were arguing that, "in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust," insofar as "such transfers would be without regard for the claims of Hawaiians to those lands to whom the State, as trustee, owes a fiduciary duty." *Id.* at 23a (internal quotation marks omitted). After reviewing the terms of the Apology Resolution, the court "agree[d] with [respondents] that the 'Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people.'" *Id.* at 32a (quoting J.A. 117a (reply brief of official respondents)). Instead, the court concluded, the Apology Resolution "acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims." *Ibid.*

The Hawaii Supreme Court then reasoned that its analysis was "also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution." Pet. App. 35a. The court concluded that the state legislation, like the Apology Resolution, "clearly contemplate[d] that native Hawaiians (1) never directly relinquished their claims to . . . their national lands to the United States, and (2) are determined to preserve, develop and transmit to future generations their ancestral territory." *Id.* at 41a (internal quotation marks and citation omitted).

As to the question of how the Apology Resolution and state law informed the disposition of the claims at hand, the Hawaii Supreme Court explained that it was "well-settled that native Hawaiian beneficiaries of the ceded lands trust have a 'right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust.'" Pet. App. 39a (quoting *Pele Defense Fund* v. *Paty*, 837 P.2d 1247, 1262 (Haw. 1992)). The court further reasoned that, as trustee, the State was "under an obligation to 'administer the trust solely in the interest of the beneficiary' and to 'deal impartially when there is more than one beneficiary.'" *Id.* at 41a (quoting *Ahuna* v. *Department of Hawaiian Home Lands*, 640 P.2d 1161, 1169-1170 (Haw. 1982)). The court ultimately held that, in light of "the Apology Resolution and related state legislation," the State possessed a "fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." *Ibid.*

The Hawaii Supreme Court proceeded to hold that respondents were entitled to injunctive relief on their breach-of-fiduciary-duty claims. Pet. App. 81a-98a. The court reasoned that, under state law, there were three requirements for a permanent injunction: "(1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction." *Id.* at 84a.

As to the first prong of that test, the Hawaii Supreme Court held that respondents had prevailed on the merits of their breach-of-fiduciary-duty claims. Pet. App. 84a-88a. The court noted that "the ceded lands are at risk of being alienated and, as previously stated, once the ceded lands are sold or transferred from the public lands trust,

they will not be available to satisfy the unrelinquished claims of native Hawaiians." *Id.* at 85a. The court observed that "the state legislature itself has announced that future reconciliation between the State and native Hawaiians will occur," *id.* at 86a, though the court added that it "need not speculate as to what a future settlement might entail—*i.e.*, whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation," *id.* at 88a.

As to the second prong, the Hawaii Supreme Court held that respondents would suffer irreparable harm if an injunction were not entered. Pet. App. 88a-94a. The court reasoned that, "without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts contemplated by" the Apology Resolution and state law." *Id.* at 88a. And as to the third prong, the court held that an injunction would be in the public interest. *Id.* at 94a-98a. The court noted that it "need look no further than the legislative pronouncement contained in Act 329, declaring that a 'lasting reconciliation [is] desired by all people of Hawai'i.'" *Id.* at 94a (quoting 1997 Haw. Sess. L. Act 329, § 1). The court therefore remanded to the trial court with instructions to enter an injunction. *Id.* at 100a.

4. After the instant petition for certiorari was filed, the trial court entered an injunction barring the sale of any ceded lands held by the State until "the unrelinquished claims of the native Hawaiians * * * have been resolved." Br. in Opp. App. 28a.

SUMMARY OF ARGUMENT

I. Petitioners sought this Court's review on the question whether the Apology Resolution "strips Hawaii

of its sovereign authority to sell" ceded lands. In doing so, petitioners were operating on an erroneous premise. The Hawaii Supreme Court did not hold that the Apology Resolution imposed an affirmative limitation, *under federal law*, on the State's ability to sell ceded lands. Instead, it merely held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians *under state law*. That duty is derived from Article XII, Section 4, of the Hawaii Constitution, which served as the basis of respondents' claims in their initial complaint (and has consistently done so since).

The Hawaii Supreme Court relied on findings in the Apology Resolution, and parallel findings in state law, simply to support the factual premise for its holding: namely, that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the reconciliation process. There is nothing problematic about a state court's reliance on factual findings from a federal statute in that manner. And insofar as the Hawaii Supreme Court held that the fiduciary duty at issue emanated from state law, not federal law, there is no merit to petitioners' suggestion that the Hawaii Legislature is somehow disabled from eliminating or alleviating any restraint resulting from the entry of an injunction. Because respondents claimed only that the sale of ceded lands would violate the State's fiduciary duty under state law, and because there is no dispute in this case about the meaning of the Apology Resolution, this Court lacks jurisdiction, and the petition for certiorari should be dismissed.

II. Having sought this Court's review on a question concerning the Apology Resolution, petitioners devote the majority of their brief, as does the United States as amicus curiae, to entirely different questions: specifi-

cally, whether any injunction barring the sale of ceded lands, even if it is based on state law, is precluded either by the Newlands Resolution (and similar federal statutes) or by the Admission Act. Those questions, however, are not within the scope of the question that was actually presented in the petition for certiorari, nor were they raised in the body of the petition. Indeed, petitioners' Newlands Resolution argument was neither pressed nor passed upon below. With the United States as a willing abettor, petitioners are thereby engaging in a classic bait and switch, by attracting the Court's attention on one question and then seeking a decision from the Court on others. That tactic should be seen for what it is: a brazen effort to disempower the Hawaii Supreme Court, which petitioners evidently view as an unfriendly forum in which to litigate state-law issues concerning the status of the ceded lands. This Court should decline petitioners' invitation to resolve questions of federal law as a matter of first impression.

In any event, the various newly minted arguments of petitioners and the United States lack merit. With regard to the Newlands Resolution, Native Hawaiians do not simply claim that they are entitled to the ceded lands as a matter of property law, but also have broader moral and political claims for compensation for the wrongs of the past. Even assuming, therefore, that the Newlands Resolution validly conveyed absolute title to the ceded lands to the federal government at the time of annexation, it would present no obstacle to the entry of an injunction pending the resolution of those broader (and concededly nonjusticiable) claims in the political process. With regard to the Admission Act, that statute merely prohibits the State from using ceded lands for other purposes besides the five enumerated purposes. The Admission Act affords the State broad discretion in the

administration of its trust responsibilities, and the State has enacted laws that guide and constrain the exercise of that discretion. In ordering the entry of an injunction, the Hawaii Supreme Court was simply interpreting those state laws; it was not thereby violating the Admission Act.

ARGUMENT

I. THE HAWAII SUPREME COURT CORRECTLY HELD THAT, IN LIGHT OF THE ONGOING RECONCILIATION PROCESS, IT WOULD CONSTITUTE A BREACH OF FIDUCIARY DUTY UNDER STATE LAW FOR THE STATE TO SELL CEDED LANDS

The only question properly before this Court is whether the Apology Resolution "strips Hawaii of its sovereign authority to sell" ceded lands. Pet. i. The Hawaii Supreme Court, however, merely relied on factual findings in the Apology Resolution (and parallel findings in state law) in holding that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians *under state law*. That holding is unremarkable as a matter of state law and presents no difficulties as a matter of federal law. Because this case, as it comes to the Court, presents no valid question of federal law, the petition for certiorari should be dismissed for want of jurisdiction.

A. In Holding That It Would Constitute A Breach Of Fiduciary Duty Under State Law For The State To Sell Ceded Lands, The Hawaii Supreme Court Merely Relied On Factual Findings In The Apology Resolution

Petitioners contend (Br. 27-30) that the Hawaii Supreme Court erroneously held that the Apology Resolution imposed an affirmative limitation, as a matter of federal law, on the State's ability to sell ceded lands.

That contention is misplaced, because petitioners' reading of the Hawaii Supreme Court's opinion is incorrect. Instead, the court simply held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians *under state law*. The court relied on the Apology Resolution (and various state laws) simply to support its central factual determination that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through that reconciliation process.

1. The Hawaii Supreme Court plainly understood that the State's fiduciary duty to Native Hawaiians arose from state law: specifically, from Article XII, Section 4, of the Hawaii Constitution, which provides that the ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public." Citing an earlier decision interpreting that provision, the court explained that it was "well-settled that native Hawaiian beneficiaries of the ceded lands trust have a 'right to bring suit under [Article XII, Section 4] to prospectively enjoin the State from violating the terms of the ceded lands trust.'" Pet. App. 39a (quoting *Pele Defense Fund*, 837 P.2d at 1262). Expounding the scope of that duty, the court noted that, as trustee, the State was "under an obligation to 'administer the trust solely in the interest of the beneficiary' and to 'deal impartially when there is more than one beneficiary.'" *Id.* at 41a (quoting *Ahuna*, 640 P.2d at 1169-1170).

Of particular importance here, in holding that the State's sale of ceded lands would breach its fiduciary duty, the Hawaii Supreme Court relied on the Apology Resolution (and various state laws) simply to support the factual premise that Native Hawaiians have unresolved claims to the ceded lands that are being addressed

through the reconciliation process. In the principal paragraph in which it analyzed the relevance of the Apology Resolution, the court "agree[d] with [respondents] that the 'Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people.'" Pet. App. 32a (quoting J.A. 117a (reply brief of official respondents)). And the court concluded that the Apology Resolution "acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims." *Ibid.* Those findings in the Apology Resolution (and similar findings in state law) provided the *factual* basis for the court's ultimate *legal* holding that the sale of the ceded lands would breach "the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." *Id.* at 41a.

Petitioners correctly note (Br. 16) that, at other points in its opinion, the Hawaii Supreme Court suggested that the Apology Resolution "dictate[d] that the ceded lands should be preserved," Pet. App. 85a, or "itself support[ed] the issuance of an injunction," *ibid.* Those shorthand statements, however, are entirely consistent with the foregoing reading of the court's opinion: *viz.*, that the court relied on the Apology Resolution simply to support its factual determination that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the reconciliation process. Insofar as the findings in the Apology Resolution are by themselves sufficient to make that factual showing (which, in turn, supported the legal holding that the State's sale of ceded lands would breach its fiduciary duty), the Apology Resolution could be said to have "supported" or even "dictated" the issuance of the in-

junction. Conversely, in the absence of the Apology Resolution (and various state laws to the same effect), respondents may not have been entitled to an injunction, because they may not have been able to make the relevant factual showing.[8] None of the passages on which petitioners rely therefore suggests that the Hawaii Supreme Court believed that the Apology Resolution imposed an affirmative limitation, as a matter of federal law, on the State's ability to sell ceded lands.[9]

2. Contrary to petitioners' assertions (Br. 11-14), respondents consistently argued before the state courts that the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians *under state law*. First, and most obviously, in the consolidated

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[8] For that reason, notwithstanding petitioners' suggestion (Br. 21-22), it is not problematic that, in holding that respondents' claims with regard to the Leiali'i parcel were not barred by waiver or equitable estoppel as a matter of state law, the Hawaii Supreme Court suggested that those claims did not arise until the date when Apology Resolution was enacted. See Pet. App. 58a-59a, 62a-63a. The court presumably concluded that the factual predicate for respondents' claims—that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the reconciliation process—had not been sufficiently established until on (or around) that date.

[9] In a passage on which petitioners do not rely, the Hawaii Supreme Court did state that the Apology Resolution and related state legislation "g[a]ve rise" to the State's fiduciary duty not to sell ceded lands. Pet. App. 41a. When read in isolation, that statement is somewhat imprecise, because the fiduciary duty to Native Hawaiians independently exists as a matter of state law—as the next sentence of the court's opinion makes clear. See *ibid.* (citing *Ahuna*, 640 P.2d at 1169). A more precise formulation is that the Apology Resolution and the cited state laws factually inform the state-law determination whether the State's sale of ceded lands would be a breach of its fiduciary duty to Native Hawaiians.

complaint, respondents claimed that any such sale would violate the State's fiduciary duty under Article XII, Section 4, of the Hawaii Constitution. See J.A. 34a, 35a. Respondents cited the Apology Resolution only in the facts section of the complaint. See J.A. 31a-32a. Consistent with the theory that the Apology Resolution was factually relevant to their claims of a breach of fiduciary duty under state law, respondents successfully asked the trial court to take judicial notice of the Apology Resolution and its factual findings. See p. 13 n.7, *supra*. Respondents also presented evidence confirming the accuracy of those findings. See, *e.g.*, J.A. 68a (testimony of Prof. Davianna McGregor).

Nor did respondents' claims "evolve[]" over the course of the litigation, as petitioners suggest (Br. 12). In the opening sentence of their opening brief to the Hawaii Supreme Court, the individual respondents contended that "[t]he central issue in this case is whether, in light of the admissions in [various state laws] and the Apology Resolution * * *, the State would breach fiduciary duties if it sold ceded lands before the Hawaiians' claim to ownership of the ceded lands is resolved." Br. 1 (footnote omitted). The individual respondents proceeded to analyze principles of Hawaii trust law at length. See *id.* at 17-26. With regard to the Apology Resolution, the individual respondents reasoned that "the fact that the Apology Resolution may not create a new cause of action or change existing law does not excuse the State from complying with its fiduciary duties or allow the State to ignore the factual admissions in [the Apology Resolution or related state laws]." *Id.* at 32. In their reply brief, the individual respondents reiterated that "the trustee would clearly breach fiduciary duties, specifically the duty of impartiality, if it sold ceded lands

against the interests of [native] Hawaiians before resolution of the Hawaiians' claim to [those] lands." J.A. 143a.

For their part, in their opening brief below, the official respondents noted that "[t]he State's role as trustee of the Public Trust Lands for the benefit of Native Hawaiians is acknowledged expressly in Article XII, Section 4 of Hawaii's Constitution." Br. 35. They contended that they were "asking the judiciary only to protect the trust assets while the dispute is being resolved by the political branches," *id.* at 29, and that, "[i]n light of the[] ongoing reconciliation negotiations, it is imperative that the trust corpus be preserved by the trustee—the State of Hawai'i," *id.* at 40. With regard to the Apology Resolution, the official respondents noted that the Apology Resolution constituted "a significant step in the process of reconciliation with Native Hawaiians by enacting a formal apology and making certain admissions." *Id.* at 11. In their reply brief, the official respondents reiterated that they were seeking to "preserve the trust corpus until the reconciliation process between the government and the Native Hawaiian people is completed." J.A. 105a. And quoting the trial court's opinion, they stated that the Apology Resolution merely "confirm[ed] the factual foundation" for preexisting claims. J.A. 115a (quoting Pet. App. 175a). While respondents' briefs contained a few statements concerning the (unquestionable) importance of the Apology Resolution as a milestone in the reconciliation process, therefore, they consistently made clear that respondents' claims were based on the State's fiduciary duty *under state law*.

B. The Hawaii Supreme Court's Reliance On Factual Findings In The Apology Resolution Was Proper

1. A state court may permissibly rely on factual findings in a federal statute to inform its determination

whether the State breached a duty it possessed under state law. It is well established, of course, that federal courts should defer to congressional factual findings when they consider constitutional challenges to federal statutes. See, *e.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 196 (1997); *Board of Education* v. *Mergens*, 496 U.S. 226, 251 (1990); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). *A fortiori*, while a state court is not *required* to rely on a congressional factual finding (or to attach a particular amount of weight to that finding) in determining whether a State breached a state-law duty, nothing in federal law *disempowers* a state court from doing so.

An example cited by the United States (Br. 30 n.5) proves the point. In 2006, Congress passed a joint resolution in honor of Chief Justice Rehnquist—and, in the preamble to that resolution, recognized the "intellect, fairness, and humor" of the late Chief Justice. See Joint Resolution to Memorialize and Honor the Contribution of Chief Justice William H. Rehnquist, Pub. L. No. 109-223, Preamble, 120 Stat. 374.

It would certainly be erroneous if, say, a Wisconsin state court construed that resolution as imposing an affirmative duty on the State of Wisconsin to erect a monument to the late Chief Justice. If a preexisting Wisconsin statute required the State to erect monuments to all Wisconsin-born public officials who possessed a superior intellect, however, a Wisconsin state court could certainly take judicial notice of (and rely on) Congress's factual findings concerning Chief Justice Rehnquist in holding that, under the state statute, the State was obligated to erect a monument in his honor. And while it might be somewhat unusual for a state court to rely *entirely* on a congressional factual finding in making that sort of determination, it would be much less un-

usual if the state court also relied on parallel findings in a contemporaneous state resolution honoring the late Chief Justice (and on testimony from his former law clerks attesting to his superior intellect). So too here, it was entirely appropriate for the Hawaii Supreme Court to rely on Congress's findings (and on parallel findings in state law) that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the ongoing reconciliation process in holding that the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians under state law.

2. Petitioners fail to cast any doubt on the ability of the Hawaii Supreme Court to rely on Congress's factual findings in the Apology Resolution.[10]

Petitioners first contend (Br. 16) that the Hawaii Supreme Court relied "primarily" on the Apology Resolution and that the court invoked various state laws "only as ancillary support" in its analysis. Even assuming that is true, but see, *e.g.*, Pet. App. 86a, it is neither problematic nor surprising. As noted above, the Hawaii Supreme Court could validly have relied *exclusively* on the Apology Resolution as support for its factual determination

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[10] In fact, in a position statement defending the constitutionality of the Akaka Bill, Attorney General Bennett recognized that it would be appropriate for "[a] court [to] give deference to [the] [c]ongressional findings" in the Apology Resolution and that those findings "are independently supported by the testimony of experts, including in recent and pending litigation." See *Can Congress Create A Race-Based Government?: Hearing Before the Subcomm. on the Constitution of H. Comm. on the Judiciary*, 109th Cong., 1st Sess. 114 n.4 (2005). In light of those concessions by petitioners' counsel, it would be remarkable if petitioners now disputed the proposition that a state court could rely on congressional findings in ruling on questions of state law. Cf. U.S. Br. at 2 n.1, 16-17, *Rice*, *supra* (No. 98-818) (relying on the findings in the Apology Resolution).

that the Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the ongoing reconciliation process. See pp. 24-26, *supra*.

The Hawaii Supreme Court's emphasis on the Apology Resolution, moreover, is entirely understandable in light of the fact that the enactment of the Apology Resolution constituted an important milestone in the reconciliation process. In addition to its findings concerning the existence of Native Hawaiian claims to the ceded lands, Congress recognized that the overthrow of the Kingdom of Hawaii was "illegal." Apology Resolution § 1, 107 Stat. 1513. That recognition was particularly significant in light of the involvement of the federal government in the overthrow, see p. 4, *supra*; indeed, it provided an obvious boost for any moral and political claims by Native Hawaiians to be compensated for the wrongs of the past, see pp. 37-42, *infra*, as well as for efforts to obtain additional recognition for Native Hawaiians as a native people. For present purposes, however, the critical point is that the Hawaii Supreme Court in no way held that the Apology Resolution created any affirmative duties or obligations as a matter of federal law. For that reason, the court's reliance on the Apology Resolution, "primar[y]" or otherwise, was entirely proper.

Petitioners also contend (Br. 29) that the disclaimer in Section 3 of the Apology Resolution "cuts against" the Hawaii Supreme Court's interpretation. Section 3 provides that "[n]othing in this * * * Resolution is intended to serve as a settlement of any claims against the United States." 107 Stat. 1514. That language, however, merely means what it says: *i.e.*, that the Apology Resolution does not *settle* any claims *against the federal gov-*

ernment.[11] It says nothing about whether a state court can rely on the Apology Resolution's factual findings in ordering the entry of an injunction as a matter of state law pending the resolution of underlying claims against the State in the state political process. It would be an impossibly muscular interpretation of that language to read it to foreclose a state court from relying on the resolution's factual findings even for state-law purposes.

Petitioners suggest (Br. 23-24) that, because the Apology Resolution is federal law, the Hawaii Supreme Court's decision relying on the Apology Resolution would "trump" any effort by the Hawaii Legislature to overcome the terms of any injunction. That suggestion is misplaced, however, because the Hawaii Supreme Court held that the State's fiduciary duty to Native Hawaiians existed as a matter of state law—and, having done so, further held only that it would be a breach of that fiduciary duty to sell ceded lands *while the reconciliation process remains ongoing on the state level.* Under the terms of the injunction entered on remand by the trial court, the State would be free to dispose of ceded lands as it sees fit once "the unrelinquished claims of the native Hawaiians * * * have been resolved," Br. in Opp. App. 28a—whether by an act of the Hawaii Legislature that definitively resolves those claims by providing land or monetary compensation, or by an act that determines that compensation for those claims is inappropriate (and thereby terminates the reconciliation proc-

[11] Contrary to petitioners' suggestion (Br. 37 n.21), because the injunction in this case was based on the State's breach of its fiduciary duty to Native Hawaiians with regard to the disposition of the State's portion of the ceded lands, it reaches only those ceded lands held by the State. Any settlement concerning ceded lands retained by the federal government would have to occur on the federal level.

ess). To the extent that the injunction imposes any restraint on the State, therefore, it does so purely as a matter of state law—and the State retains plenary power to eliminate or alleviate that restraint.[12]

C. The Hawaii Supreme Court Correctly Held As A Matter Of State Law That It Would Constitute A Breach Of Fiduciary Duty For The State To Sell Ceded Lands

If the Hawaii Supreme Court properly relied on the factual findings in the Apology Resolution, the only remaining question is whether the court correctly held that, in light of the fact that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians. While that question is one of state law that this Court lacks the authority to review, the Hawaii Supreme Court's holding was in any event correct.

1. Hawaii law defines the contours of the State's trust obligations with regard to the ceded lands. Article XII, Section 4, of the Hawaii Constitution, provides that the ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public." Interpreting that provision, the Hawaii Supreme Court has confirmed that the State owes a fiduciary duty to all of

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[12] In fact, Governor Lingle—a petitioner in this case—has recently and repeatedly stated that "we don't have any intention of going out and selling ceded lands." Governor Linda Lingle, Media Release (Jan. 18, 2009) <tinyurl.com/linglerelease>; see Olena Rubin, *Protest in Waikiki Over Ceded Lands*, KHON-2 News (Jan. 17, 2009) <tinyurl.com/linglekhon> (quoting Governor Lingle's statement that "there is no intention to sell ceded lands"). Those statements raise serious questions as to whether a live dispute actually remains in this case.

the beneficiaries of the ceded-lands trust—and that beneficiaries, including Native Hawaiians, may bring suit to enjoin the State from engaging in conduct that constitutes a breach of that trust. See *Pele Defense Fund*, 837 P.2d at 1262. Other contemporaneous provisions of the Hawaii Constitution, in turn, make clear that, while the State retains the discretion to use assets in the ceded-lands trust for any of the purposes set out in the Admission Act, the State owes a particularly high duty to Native Hawaiians. See, *e.g.*, Haw. Const. Art. XVI, § 7; cf. *OHA I*, 31 P.3d at 914 (noting that "the State's obligation to native Hawaiians is firmly established in our constitution").

As the Hawaii Supreme Court noted in this case, a fundamental principle of trust law, applicable to the ceded-lands trust, is that a trustee is obligated to "deal impartially when there is more than one beneficiary." Pet. App. 41a (quoting *Ahuna*, 640 P.2d at 1169-1170); see, *e.g.*, Restatement (Third) of Trusts § 79(1) (2003). The court did not dispute that the State was proposing to sell the Leiali'i parcel for a valid trust purpose: *viz.*, for the development of home ownership. See Admission Act § 5(f), 73 Stat. 6. Instead, the court held that the State would effectively abuse its discretion by selling ceded lands for that purpose (or another valid trust purpose) in light of the ongoing reconciliation process, because such a sale would be in substantial derogation of the interests of another class of trust beneficiaries, the Native Hawaiians. The court noted that, "once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of Native Hawaiians" in the reconciliation process. Pet. App. 85a.

Crucially, while the Hawaii Supreme Court noted that the Native Hawaiians' claims could be resolved by

monetary compensation (rather than the transfer of land), Pet. App. 88a, that court, like the trial court before it, recognized the central importance of land to the Native Hawaiian people. See *ibid.* As the trial court noted, *'aina*, or land, is "of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being." *Id.* at 196a-197a. To the Native Hawaiians, "land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians." *Id.* at 197a. Indeed, "[t]he *'aina* is part of [Native Hawaiians'] *'ohana* [or family], and they care for it as they do for other members of their families." *Ibid.* Because of the very real possibility that at least some portion of the ceded lands would be transferred to the Native Hawaiians at the culmination of the reconciliation process (and the resulting irreparable harm if the lands were sold in the intervening period), the Hawaii Supreme Court correctly held that it would constitute a breach of the State's fiduciary duty to Native Hawaiians to sell ceded lands while the reconciliation process remains ongoing, even for another valid trust purpose. See *id.* at 84a-88a.

2. Petitioners could argue, as they did below, that the State retained plenary power, as a matter of state law, to sell ceded lands for any valid trust purpose, see, *e.g.*, Pet. Haw. S. Ct. Br. 23-36—and that the Hawaii Supreme Court therefore erred in striking the balance that it did between the trust objective of bettering the conditions of Native Hawaiians and other trust objectives. Because any such argument would turn on state law, this Court would lack the authority to consider it. In any event, as the foregoing discussion demonstrates, the Hawaii Supreme Court was correct in holding that the State would breach its fiduciary duty to Native Hawai-

ians by selling ceded lands while the reconciliation process remains ongoing.

D. Because The Hawaii Supreme Court's Decision Rested On State Law, This Court Should Dismiss The Petition For Lack Of Jurisdiction

1. In the petition for certiorari, petitioners invoked this Court's jurisdiction under 28 U.S.C. 1257, which provides, in relevant part, that the Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State * * * where any title, right, privilege, or immunity is specially set up or claimed under [federal law]." Because respondents claimed only that the sale of ceded lands would violate the State's fiduciary duty under Article XII, Section 4, of the Hawaii Constitution, and because the Hawaii Supreme Court ruled in respondents' favor only on those claims, respondents have not claimed, and the Hawaii Supreme Court did not set up, any "title, right, privilege, or immunity" under the Apology Resolution.

Nor, as the case comes to this Court, is there any dispute about the *meaning* of federal law. To the extent that the Hawaii Supreme Court relied on factual findings under the Apology Resolution in holding that the sale of ceded lands would constitute a breach of the State's duty under state law, there is no disagreement about what Congress actually meant in those findings—and there is therefore no substantial question involving the interpretation of federal law for this Court to resolve. See Pet. App. 88a (noting that "Congress, the Hawai'i state legislature, the parties, and the trial court all recognize," *inter alia*, "the cultural importance of the land to native Hawaiians"; "that the ceded lands were illegally taken from the native Hawaiian monarchy"; and "that future reconciliation between the state and the native Hawaiian people is contemplated"). While petitioners may dis-

agree about the implications of the Apology Resolution's findings under *state* law, that disagreement does not suffice to confer jurisdiction on this Court.

2. For the reasons stated above, see pp. 19-24, *supra*, the correct reading of the Hawaii Supreme Court's opinion is that the court held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians under state law. In the event that this Court were to conclude that there is any ambiguity as to whether the decision below rested on state law or federal law as the source of that duty, however, the appropriate course would be to vacate the Hawaii Supreme Court's judgment and remand the case for further proceedings, so as to afford that court the opportunity to clarify that its decision did in fact rest on state law. See, *e.g.*, *Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378 (1984) (per curiam); *Michigan* v. *Long*, 463 U.S. 1032, 1041 n.6 (1983).

Even assuming, moreover, that it would have been erroneous for the Hawaii Supreme Court to rely *in any way* on the Apology Resolution (even on its factual findings), it is worth noting that all of the relevant findings in the Apology Resolution were accompanied by parallel findings in state law: indeed, in the opinion under review, the Hawaii Supreme Court arguably placed as much weight on the latter findings as it did on the former. See, *e.g.*, Pet. App. 86a. In its 1993 concurrent resolution, the Hawaii Legislature made materially identical findings to the ones Congress made in the Apology Resolution a few months later, including the findings (1) that the overthrow of the Hawaiian kingdom was "illegal"; (2) that "the indigenous Hawaiian people never directly relinquished their claims * * * over their national lands to the United States"; and (3) that "the health and well-being of the Native Hawaiian people is

intrinsically tied to their deep feelings and attachment to the land." See 1993 Haw. H.R. Con. Res. No. 179. Other state laws—which the Hawaii Supreme Court discussed at length in its opinion, see Pet. App. 35a-39a—contained findings to the same effect. In addition, there was abundant other evidence concerning the ongoing reconciliation process. See pp. 8-11, *supra*.

Notwithstanding the importance of the Apology Resolution as a milestone in the reconciliation process, therefore, the Hawaii Supreme Court could readily have reached the same result without relying on the Apology Resolution at all. Because the Hawaii Supreme Court did not impermissibly rely on the Apology Resolution in the opinion under review, however, the Court should simply dismiss the petition for want of jurisdiction.

II. THE REMAINING ARGUMENTS CONCERNING FEDERAL LAW PRESENTED BY PETITIONERS AND THE UNITED STATES ARE NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT LACK MERIT

Having sought this Court's review on the question whether the Apology Resolution "strips Hawaii of its sovereign authority to sell [ceded lands] unless and until it reaches a political settlement with native Hawaiians about the status of th[ose] land[s]," Pet. i, petitioners devote a scant four pages of their opening brief to that question. See Br. 27-30. Instead, having successfully obtained this Court's review on that question, petitioners devote the remainder of their brief, and the United States devotes the majority of its brief, to entirely different questions: namely, whether any injunction barring the sale of ceded lands, even if based on state law, is precluded either by the Newlands Resolution (and similar federal statutes) or by the Admission Act. Those ques-

tions are not properly presented, and the underlying arguments in any event lack merit.

A. Petitioners' Argument Concerning The Newlands Resolution And Similar Federal Statutes Is Not Properly Before The Court And Should Be Rejected

Petitioners contend (Br. 31-46) that, by initially vesting absolute title to the ceded lands in the federal government, "[t]he Newlands Resolution and similar federal enactments * * * preclude any injunctive relief—whether based on federal or state law—that is designed, as the current injunction is, to preserve possible Native Hawaiian claims of legal title." Br. 31. That contention is not properly raised, because it is not within the scope of the question presented, was not raised in the petition for certiorari, and was not pressed or passed upon below. That contention also lacks merit, because it is based on a further misreading of the Hawaii Supreme Court's opinion: *i.e.*, that the court ordered entry of an injunction based solely on the existence of *legal* claims by Native Hawaiians of entitlement to the ceded lands as a matter of property law.

1. It is plain that any argument based on the Newlands Resolution (or similar federal statutes) is not within the scope of the question presented. That question is whether the *Apology Resolution* "strips Hawaii of its sovereign authority to sell" ceded lands, Pet. i—not whether an injunction barring the sale of ceded lands, regardless whether that injunction is based on the Apology Resolution or on state law, would contravene the *Newlands Resolution*, Pet. Br. 31. Nor did petitioners so much as cite the Newlands Resolution, even once, in the petition (or, for that matter, in the reply).

It is a familiar rule of this Court that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R.

14.1(a). That rule "help[s] to maintain the integrity of the process of certiorari," and "allowing the able counsel who argue before us to alter the[] questions [presented] or to devise additional questions at the last minute would thwart this system." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Although petitioners were represented at the certiorari stage by some of the most able and experienced members of this Court's Bar, petitioners made no effort to preserve any argument concerning the Newlands Resolution. That failure constitutes a sufficient basis for this Court to refuse to consider the Newlands Resolution argument now.

Even if petitioners had presented their additional question concerning the Newlands Resolution in the petition for certiorari, moreover, it would not be appropriate for this Court to consider that question, because it was neither pressed nor passed upon below. Although it was clear that respondents were seeking an injunction pending the resolution of the underlying claims of Native Hawaiians in the reconciliation process, see, *e.g.*, J.A. 35a, 36a, petitioners did not argue before the Hawaii Supreme Court that, because the federal government had absolute title to the ceded lands pursuant to the Newlands Resolution (or similar federal statutes), an injunction would be improper. In fact, petitioners cited the Newlands Resolution only once in their brief below—and that in a single sentence of the facts section. See Pet. Haw. S. Ct. Br. 5-6. Accordingly, in the course of its actual analysis, the Hawaii Supreme Court did not discuss the Newlands Resolution either. As "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court ordinarily does not consider questions that were neither pressed nor passed upon below, particularly when reviewing state-court decisions. See, *e.g.*, *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per

curiam); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). That settled practice constitutes an independent basis for this Court to refuse to address any question concerning the Newlands Resolution.

Remarkably, while petitioners are quick to point out in their opening brief that other arguments raised by their amici are not properly before this Court because they were "neither raised in or decided by" the Hawaii Supreme Court, see Br. 27 n.16, they make no effort to justify their own failure to raise the Newlands Resolution argument either below or in their certiorari petition. This Court should not countenance such flagrant defiance of its rules and practices.[13]

2. In any event, petitioners' argument based on the Newlands Resolution (and similar federal statutes) lacks merit. Petitioners contend that, in the Newlands Resolution, the federal government took absolute title to the ceded lands, and that the federal government therefore passed absolute title to the State at the time of admission. Petitioners further contend that, in ordering the entry of an injunction barring the sale of ceded lands while the reconciliation process remains ongoing, the Hawaii Supreme Court relied solely on the existence of

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[13] It is ironic that the State would seek to introduce new issues into the case before this Court, because, in *Rice*, the State successfully *opposed* a similar effort by the petitioner in that case. In response to the petitioner's suggestion that other aspects of state law relating to the treatment of Native Hawaiians (besides the restriction on eligible voters in OHA elections) were unconstitutional, Governor Cayetano asserted that "[t]his Court's customary practice is to deal with the case as it came here and affirm or reverse based on the ground relied upon below." Resp. Br. at 16, *Rice*, *supra* (No. 98-818) (internal quotation marks and citation omitted).

legal claims by Native Hawaiians to the ceded lands. Because those claims are foreclosed by the Newlands Resolution, petitioners' argument goes, any injunction, whether based on federal or state law, would be invalid.

That argument lacks merit, because petitioners' minor premise is flawed: the Hawaii Supreme Court did not order entry of an injunction based on any assumption that Native Hawaiians had exclusively legal claims to the ceded lands. As a preliminary matter, respondents effectively conceded below that any underlying claims to the lands (as opposed to their instant claims for breach of fiduciary duty) were nonjusticiable, see, *e.g.*, *Yamasaki*, 737 P.2d at 457-458, and that such underlying claims would therefore be resolved only through the state political process. See, *e.g.*, Official Resp. Haw. S. Ct. Br. 29 (stating that respondents "[are] not seeking a judicial resolution of the underlying claim for a return of lands, but [are] rather asking the judiciary only to protect the trust assets while the dispute is being resolved by the political branches"); Indiv. Resp. Haw. S. Ct. Br. 13 (noting that respondents "do not seek an ownership determination or even a declaration that they are entitled to the beneficial use and/or occupancy of the ceded lands"). Consistent with those statements, the Hawaii Supreme Court recognized that it was "*not* being asked to decide whether native Hawaiians are *entitled* to the ceded lands," Pet. App. 79a, and that the "ultimate resolution of the [n]ative Hawaiian claims must be through the political process," *ibid.* (quoting J.A. 122a (reply brief of official respondents)).[14]

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[14] Petitioners do not claim that there is anything wrong, as a matter of state remedial law, with the entry of an injunction, based on breach of a state-law duty, to maintain the status quo while underlying claims are being addressed through the political process. See,

Petitioners nevertheless contend (Br. 33) that the Hawaii Supreme Court operated on the premise that there was a "cloud on the title" to the ceded lands as a result of the Apology Resolution and related state laws—and therefore that the underlying claims of Native Hawaiians to the ceded lands were exclusively legal claims. As a preliminary matter, to the extent that respondents referred in their briefs below to the concept of a "cloud on the title" to the ceded lands, it suggests only that *some* type of claims were being made concerning the ceded lands—not that the underlying claims were necessarily *legal* claims.

More broadly, while petitioners contend that the Hawaii Supreme Court "adopted [a] 'cloud on the title' argument as the basis for issuing its injunction" (Br. 33), they tellingly cite no passage in which the court actually did so. That is unsurprising, because the court did not rely on the concept of a "cloud on title" in the course of its actual analysis. Instead, in the passages petitioners do cite in support of that critical contention, the court merely recognized that Native Hawaiians have "unrelinquished claims," without opining on the nature (or validity) of those claims. See Pet. App. 85a (noting that "the

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e.g., 1 Dan B. Dobbs, *Dobbs' Law of Remedies* § 2.9(2), at 227 (2d ed. 1993) (noting that "injunctions may run even when the plaintiff does not assert a developed legal theory or a preexisting primary right that would be subject to other remedies"); cf. *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (ordering entry of an injunction, as a matter of federal law, of the sale of lands claimed by Native Americans). Any such claim would not properly lie before this Court and would also lack merit, because the Hawaii Supreme Court has previously held that it has broad equitable powers to enforce the State's fiduciary duty to Native Hawaiians pursuant to the ceded-lands trust. See *Pele Defense Fund*, 837 P.2d at 1262.

native Hawaiian people have unrelinquished claims over the ceded lands"); *ibid.* (referring to "the unrelinquished claims of native Hawaiians"). There is therefore no reason to believe that the Hawaii Supreme Court ordered entry of an injunction based on the assumption that Native Hawaiians had solely *legal* claims to the ceded lands.

Regardless whether Native Hawaiians have legal claims to the ceded lands, however, they clearly have broader moral and political claims: *i.e.*, claims that they are entitled to compensation for the wrongs of the past, even if the original cessation of lands to the United States was valid as a matter of federal law. See, *e.g.*, Official Resp. Haw. S. Ct. Br. 37 n.24; 11/27/01 Tr. 25, 33 (testimony of Prof. David Getches).[15] There is nothing unusual about such moral and political claims: when Congress established the Indian Claims Commission, it expressly conferred authority on the Commission to consider that type of claims. See Indian Claims Commission Act, ch. 959, § 2(5), 60 Stat. 1049, 1050 (1946) (providing forum for Indian tribes to bring, *inter alia*, "claims [against the United States] based upon fair and honorable dealings that are not recognized by any existing rule

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[15] It is true that, at earlier points in this litigation, respondents did suggest that Native Hawaiians have potentially valid (if not justiciable) legal claims to the ceded lands, based on, *inter alia*, (1) the status of the Kingdom of Hawaii as an independent nation; (2) the involvement of the United States in the conspiracy to overthrow the Kingdom, in violation of its treaties with the Kingdom and other international obligations; and (3) Congress's failure, in the Newlands Resolution, validly to extinguish those obligations. See, *e.g.*, Indiv. Resp. Haw. S. Ct. Br. 26 & n.21; *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934). The critical point, however, is that none of the parties asked the Hawaii Supreme Court to rule on the nature (or validity) of the underlying claims, and the court accordingly did not do so.

of law or equity"); see also, *e.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 387 (1980). Such moral and political claims have served as the basis for Congress to grant lands (or trust rights) to Native American tribes and individuals, see, *e.g.*, Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437, and indeed to set aside a portion of the ceded lands specifically for Native Hawaiians, see Hawaiian Homes Commission Act § 207, 42 Stat. 110. Indeed, even petitioners freely recognize that "Native Hawaiians * * * have strong *moral* claims on the political branches of government for recompense." Br. 45.

To the extent that Native Hawaiians have moral and political claims concerning the ceded lands, moreover, the Newlands Resolution would present no obstacle to the entry of an injunction pending the resolution of *those* claims in the political process. If the Hawaii Legislature were to provide compensation to the Native Hawaiians for the wrongful taking of lands previously owned by the Kingdom of Hawaii—whether that compensation involved the transfer of land or some other form of recompense—it could readily do so without casting any doubt on the validity of the cessation of lands to the United States. The only even arguable limitations on the Hawaii Legislature's ability to provide such compensation would stem not from the Newlands Resolution, but from any countervailing trust obligations under the Admission Act and state law. At bottom, petitioners' recognition (Br. 45) that Native Hawaiians have valid moral and political claims cannot be reconciled with their unelaborated suggestion (*ibid.*) that the Newlands Resolution somehow disables the Hawaii Supreme Court from ordering the

entry of an injunction pending the resolution of those claims in the political process.[16]

3. Petitioners' argument fails for the related reason that, insofar as they are arguing that the eventual *resolution* of Native Hawaiians' underlying claims to the ceded lands might violate the Newlands Resolution, such an argument is unripe. If, for example, the Hawaii Legislature were eventually to confer land on Native Hawaiians for the express reason that the federal government's taking of absolute title to the ceded lands at the time of annexation was legally invalid, such legislation could conceivably be challenged on the ground that it is inconsistent with the Newlands Resolution. As noted above, however, if the Legislature were to provide compensation to Native Hawaiians simply for the wrongs of the past, without stating any opinion on the legality of the federal government's taking of title to the ceded lands, no issue involving the Newlands Resolution could possibly arise. See pp. 37-42, *supra*. Because the Hawaii Legislature has not yet taken any action on Native Hawaiians' underlying claims, it is simply premature to speculate about the possibility that such an action would be inconsistent with the Newlands Resolution.

By contrast, the injunction that the Hawaii Supreme Court ordered, based on its disposition of respondents' *instant* breach-of-fiduciary-duty claims, presents no difficulty under federal law. As the Hawaii Supreme Court repeatedly noted, that injunction merely preserves the status quo as a matter of state law until the *underlying*

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[16] For the same reason, the Newlands Resolution would not disable the Hawaii Legislature from passing a statute declaring a moratorium on the sale of ceded lands until it has the opportunity to resolve the underlying claims of Native Hawaiians to the lands.

claims of Native Hawaiians are resolved in the reconciliation process. See, *e.g.*, Pet. App. 95a. It is in no way based on any definitive conclusion that those underlying claims are valid, whether as legal claims or as moral and political claims. That is presumably why petitioners did not invoke the Newlands Resolution before the Hawaii Supreme Court. And it is yet another reason why this Court should refuse to consider petitioners' late-breaking Newlands Resolution argument now.

B. The United States' Argument Concerning The Admission Act Is Not Properly Before The Court And Should Be Rejected

The United States contends (Br. 20-23) that "[a]ny judicially imposed freeze on transfer of trust assets would necessarily contradict Congress's authorization to the State," in the Admission Act, "to sell or otherwise dispose of lands to promote the trust purposes." Br. 21. That argument, like petitioners' Newlands Resolution argument, is not properly raised, because it is not within the scope of the question presented and was not raised in the petition for certiorari. It also lacks merit, because the Admission Act does nothing more than to specify the purposes for which trust assets may be used.

1. Any argument based on the Admission Act is not within the scope of the question presented. Again, the question presented in this case is whether the *Apology Resolution* "strips Hawaii of its sovereign authority to sell" ceded lands, Pet. i—not whether an injunction barring the sale of ceded lands, regardless whether that injunction is based on the Apology Resolution or on state law, would violate the *Admission Act*, U.S. Br. 21. Although petitioners noted in the petition for certiorari that the State had "[the] sovereign power * * * to manage and sell or exchange its own public lands within the broad limits set forth in the Admission Act," Pet. 15,

they nowhere suggested that an injunction would itself actually *violate* the Admission Act. Accordingly, in the brief in opposition, respondents noted that the petition "d[id] not assert a violation of the * * * Admission Act," Br. in Opp. 2 n.1; in their reply, petitioners did not so much as cite the Admission Act by way of a response. No question concerning the Admission Act can therefore be said to have been "set out in the petition" or "fairly included therein." S. Ct. R. 14.1(a).

To be sure, petitioners did contend before the Hawaii Supreme Court, albeit in passing, that the Admission Act authorized the State to sell ceded lands. See Pet. Haw. S. Ct. Br. 22-23. The court noted, but did not specifically address, that contention. See Pet. App. 82a n.26. Even assuming that the argument that an injunction would violate the Admission Act had been sufficiently pressed and passed upon below, however, it would not excuse petitioners' failure to raise that argument in their petition for certiorari.

In a footnote tucked away at the end of its brief, the United States seemingly attempts to excuse petitioners' failure, in their petition, to raise an Admission Act defense to the injunction. In full, that footnote states as follows: "The state supreme court did not address the federal [*i.e.*, Admission Act] defense to the injunction expressly. Because the relevant principles of federal law are made clear in examining the Apology Resolution and the body of law it left intact, however, this Court can and should resolve the case at this stage." Br. 32 n.6. With no disrespect to the Solicitor General, it is hard to know how to respond to that argument, because it is hard to know what it means. If the United States is suggesting, however, that a question presented that focuses exclusively on the Apology Resolution somehow opens the door for this Court to consider any other question con-

cerning any preexisting provision of federal law relating to the ceded lands, that is an astonishing proposition indeed. No question concerning the Admission Act was in this case as it was presented to the Court at the certiorari stage, and there is no basis for permitting an amicus curiae, even the United States, to inject that question into the case at the merits stage.

2. In any event, the United States' argument based on the Admission Act, like petitioners' argument based on the Newlands Resolution, fails on its own terms. The Admission Act provides that the State is required to "manage[] and dispose[] of [its share of the ceded lands] for one or more of [five] purposes in such manner as the constitution and laws of [the] State may provide," including, as is relevant here, "for the betterment of the conditions of native Hawaiians" and "for the development of farm and home ownership on as widespread a basis as possible." § 5(f), 73 Stat. 6. While it is certainly true that the Admission Act contemplates the possibility that the State might sell all or some of the lands for trust purposes, the Admission Act provides no guidance as to *how* the State should balance the competing trust purposes. To the contrary, it authorizes the State to "provide" in state law for the "manner" in which it will administer the ceded lands. *Ibid.* Moreover, it authorizes the State to manage the lands for "one or more" of the five enumerated purposes (thereby presumably allowing the State to use the lands exclusively for any one, or for fewer than all, of those purposes). *Ibid.*

As a practical matter, therefore, the only affirmative limitation imposed by the Admission Act is that it prohibits the State from using ceded lands for other purposes *besides* the five enumerated purposes: for example, by giving a parcel of land to a private circus troupe. See *Price* v. *Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990)

(noting that, "at least at the outer limits[,] federal law must act as a barrier beyond which the State cannot go in its administration of the ceded lands pursuant to section 5(f)"). Indeed, the provision in the Admission Act that authorizes the federal government to bring suit for a breach of trust confirms as much, because it authorizes suit only in the event that the ceded lands are "use[d] for any other object": *i.e.*, for a purpose besides the five enumerated purposes. § 5(f), 73 Stat. 6.

By affording the State such broad discretion in the administration of its trust responsibilities, the Admission Act differs from other acts of admission. For example, the New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910), specified particular beneficiaries for public lands, required the creation of separate trust accounts for each beneficiary, and imposed a variety of procedural requirements concerning the administration of those accounts. See *Ervien* v. *United States*, 251 U.S. 41, 47 (1919). Unlike the Admission Act, that act contained no provision broadly delegating authority to the State to administer the trust.[17] The mere fact that the Hawaii

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[17] The United States contends that, in *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), this Court interpreted the phrase "as the State legislature may direct" in "the New Mexico Enabling Act" as "not licens[ing] the state legislature to disregard the Enabling Act's 'express restrictions.'" Br. 23. In the cited part of that opinion, however, the Court was construing not the New Mexico-Arizona Enabling Act, but rather the Jones Act, ch. 57, 44 Stat. 1026 (1927), "a brief statute that extended the terms of the original grant of lands in the Western States to encompass mineral lands as well." 490 U.S. at 626. In the Jones Act, Congress provided that any new land grants "shall be of the same effect as prior grants" under the New Mexico-Arizona Enabling Act, but that the State may grant leases "as the State legislature may direct." § 1, 44 Stat. 1026. The Court held that, notwithstanding the latter language, the lands covered by the

ceded-lands trust was *established* by federal law—and is therefore, as the United States repeatedly admonishes, a "federal trust," Br. 1, 8, 9, 12, 19, 20, 21, 25, 32—does not alter the fact that the Admission Act leaves broad discretion to the State in the administration of its trust responsibilities. Indeed, in an earlier brief to this Court, if not in its brief in this case, the United States recognized as much. See U.S. Br. at 10, *Rice*, *supra* (No. 98-818) (stating that, "[i]n the Admission Act, Congress delegated broad authority to Hawaii to act for the betterment of Native Hawaiians").[14]

Because the State possesses such broad discretion under the Admission Act to use the ceded lands for any of the enumerated trust purposes, it necessarily follows (as the Admission Act recognizes) that the State has the authority to enact laws that guide, and even constrain, the exercise of that discretion. The State did exactly that when it adopted the 1978 amendments to the Hawaii Constitution, which provided that the ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public," Haw. Const. Art. XII, § 4, and specifically emphasized the importance of providing for Native Hawaiians, see, *e.g.*, Haw. Const. Art. XVI, § 7. The State thus made clear that it had a fiduciary duty to the enumerated beneficiaries of the ceded-lands trust, particularly to Native Hawaiians—and that the

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Jones Act were subject to all of the same requirements provided in the Enabling Act. See *ASARCO*, 490 U.S. at 628-633.

[14] See also Resp. Br. at 8-9, *Rice*, *supra* (No. 98-818) (noting that, "[i]n light of Hawaii's unique historical and geographic circumstances, it is perhaps not surprising that Congress chose to delegate to the State authority to manage the public trust for Native Hawaiians").

State's administration of the trust would be governed by ordinary trust principles *as a matter of state law*.[19] In holding that the State would breach its fiduciary duty to Native Hawaiians if it sold ceded lands while the reconciliation process remains ongoing, even if the State did so for another valid trust purpose, the Hawaii Supreme Court was merely interpreting state law (specifically, the nature and scope of the State's fiduciary duty to Native Hawaiians under Article XII, Section 4, of the Hawaii Constitution). It was not unwittingly transgressing some limitation implicit in the Admission Act.

The United States contends that, by permitting the State to manage the ceded lands "in such manner as the constitution and laws of [the] State may provide," Admission Act § 5(f), 73 Stat. 6, Congress "referred to state law as a way to fill in the details of the State's federal-law trusteeship obligation, not to authorize a state court to rewrite that trusteeship obligation." Br. 22-23. Under the Admission Act, however, the State's sole "trusteeship obligation" is not to use ceded lands for a purpose *besides* the five enumerated purposes. Where the State provides in its "constitution and laws" that its discretion to use the ceded lands for the five enumerated purposes is to be exercised in a particular manner, it is entirely natural that the State's highest court retains the power to interpret the State's constitution and laws as it sees fit. In doing so, the court is not "rewrit[ing] [the State's] trusteeship obligation" under the Admission Act; in-

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[19] Because the constitutional provisions establishing the State's fiduciary duty to Native Hawaiians were adopted pursuant to the Admission Act's authorization to "provide" for the "manner" in which the State will administer the ceded-lands trust, the resulting duty is not "external" to the trust, as the United States suggests (Br. 9, 20, 21, 32).

stead, it is merely exercising its familiar authority to construe state law.[20]

3. Finally, the United States suggests (Br. 22) that, if the State of Hawaii were to resolve the claims of Native Hawaiians by providing land or monetary compensation, it would independently violate the Admission Act, because the Admission Act defines Native Hawaiians only as those descendants of "not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act § 201(7), 42 Stat. 108; see Admission Act § 5(f), 73 Stat. 6 (incorporating definition). Like petitioners' Newlands Resolution argument, however, that argument fails because, insofar as the United States is implying that the eventual resolution of Native Hawaiians' underlying claims to the ceded lands might violate the Admission Act, such an argument is unripe.

In the event that the Hawaii Legislature decides to make provision to Native Hawaiians who do not meet the Admission Act's narrow definition of the phrase, the resulting legislation could perhaps be challenged on the ground that it constitutes an impermissible use of trust assets under Section 5(f) of the Admission Act (though subsequent federal statutes have consistently used a

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[20] Perhaps not surprisingly, petitioners do not seem to embrace the United States' apparent view that the Admission Act occupies the field with regard to the administration of the ceded-lands trust. Instead, they suggest only that "a state court could violate the Admission Act if it disregards 'the constitution and laws' of Hawaii." Br. 46 n.26. In the decision below, however, the Hawaii Supreme Court did not "disregard" any state law. Instead, it simply interpreted and applied state law in holding that the State would breach its fiduciary duty to Native Hawaiians if it sold ceded lands while the reconciliation process remains ongoing.

broader definition, see, *e.g.*, 42 U.S.C. 2992c(4)). Indeed, the federal government itself would be free to bring suit on that ground—if it truly believed that, notwithstanding the subsequent federal statutes, there was an Admission Act violation. See Admission Act § 5(f), 73 Stat. 6. Because the Hawaii Legislature has not yet taken any action on Native Hawaiians' underlying claims, however, it is simply premature to speculate about the possibility that such an action would be inconsistent with the Admission Act, just as it would be premature to speculate about possible inconsistency with the Newlands Resolution. Like the other federal-law issues that petitioners and the United States seek to introduce into the case at this late hour, that issue can be left for another day.

* * * * *

All that the Hawaii Supreme Court actually did in this case was to order the entry of an injunction, as a matter of state law, prohibiting the executive branch of the state government from selling lands the State holds in trust until the state legislature resolves the claims of a group of beneficiaries to those lands. Notwithstanding the history with which the underlying dispute is freighted, therefore, this case, as it comes to the Court, presents only questions of state law. Far from working an affront to state sovereignty, as petitioners suggest, the Hawaii Supreme Court's decision simply maintains the status quo and puts the ball back in the court of the Hawaii Legislature, so that it can bring an end, one way or the other, to decades of uncertainty concerning the status of Native Hawaiians' claims to state-owned lands. There is no legitimate reason for the Court to interfere with that ongoing process. Because this case presents no valid dispute about the meaning of federal law, the Court should dismiss the petition for want of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be dismissed. In the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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JANUARY 2009

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article XII, Section 4, of the Hawaii Constitution provides:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

2. Article XII, Section 5, of the Hawaii Constitution provides:

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

3. Article XII, Section 6, of the Hawaii Constitution provides:

> The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

4. Article XII, Section 7, of the Hawaii Constitution provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

5. Article XVI, Section 7, of the Hawaii Constitution provides:

> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

REPLY BRIEF

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(30)

Supreme Court, U.S.
FILED
FEB 6 - 2009
OFFICE OF THE CLERK

No. 07-1372

IN THE

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v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION AND SUMMARY

1. With scarcely a nod to the merits, respondents ask this Court to dismiss certiorari for lack of federal jurisdiction. That position is as baseless now as when respondents unsuccessfully raised it in opposition to certiorari. Under the plain-statement rule of *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 1040-1041. Here there is no avoiding the essential federal-law character of this case. The Hawaii Supreme Court ruled that the federal Apology Resolution "dictate[d]" entry of the challenged

injunction (Pet. App. 85a) and that respondents' claims did not even arise until the Resolution was enacted (*id.* at 58a-59a, 62a-63a, 99a). And federal law, as embodied in the Newlands Resolution and the Admission Act, forecloses the inference that the Hawaii court sought to derive from the Apology Resolution: that Congress has recognized the potential legal validity of Native Hawaiian title to the ceded lands.

Rather than engage the merits of these federal issues, respondents contend that the Hawaii Supreme Court, which cited the Apology Resolution *77 times*, invoked it merely as a recitation of historical facts about the overthrow of the Hawaiian monarchy rather than as a source of legal rights and obligations. But the court's opinion speaks for itself, and it says the opposite.

The Hawaii Supreme Court held that the Apology Resolution compelled the issuance of an injunction because, among other things, the Resolution "clearly acknowledged the *illegality* of the overthrow," the illegitimacy of the Republic of Hawaii, and "the existence of the [N]ative Hawaiians' *unrelinquished claims* to the ceded lands." Pet. App. at 33a (emphasis added). These propositions are legal, not factual. And like respondents, the court treated them as an essential and previously unavailable basis for concluding that Native Hawaiian claims of title to the ceded lands, while ultimately non-justiciable, had assumed enough legal substance to warrant preservation of those lands from alienation. To the extent the Hawaii court also relied on state trust-law principles in reaching that conclusion, the court's reliance on those principles was plainly "interwoven with federal law," and certainly "the adequacy and independence of any possible state law

ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. at 1040-1041.

2. On the merits, the state court's reliance on the Apology Resolution is untenable as a matter of federal law. The Resolution does not support any claims of Native Hawaiian title to the ceded lands and, indeed, *could* not support such claims without *sub silentio* repealing the Newlands Resolution and the Admission Act, both of which foreclose any such claims. There is no merit to respondents' efforts to detach those prior enactments from the scope of the question presented. Among other considerations, this Court could not sensibly consider whether the Apology Resolution "changed the legal landscape and restructured the rights and obligations of the State" (Pet. App. 27a) without examining the prior federal enactments that defined—and still define that very landscape.

Moreover, the legal consequences of those enactments on claims of Native Hawaiian title are simple for this Court to identify because they are undisputed. Respondents do not deny that, under the Supremacy Clause, the Newlands Resolution and Admission Act bar any judicial holding based on the premise that Native Hawaiians may have legal claims (whether justiciable or not) to the ceded lands. To salvage the opinion under review, therefore, respondents assert that the Hawaii Supreme Court did not "rel[y] solely on the existence of *legal* claims by Native Hawaiians to the ceded lands," and that it relied in part on non-legal "moral and political claims." Resp. Br. 37-38, 40. But this rationale cannot insulate the challenged injunction from the Supremacy Clause if as the state court's own opinion makes clear the injunction also relies on a critical premise that the Apology Resolution conferred

new legitimacy on Native Hawaiian legal claims to the ceded lands.

Finally, despite artful wording, respondents do not (and could not) claim that the Hawaii Supreme Court abandoned its judicial role altogether and imposed its will on the state's political branches *solely* on the basis of its own non-legal intuitions about moral entitlement. A state court should be presumed not to have arrogated such unprecedented extrajudicial powers to itself in the absence of a plain statement to that effect. Here, the only plain statements in the opinion under review point in the opposite direction: The court ruled as it did because, in necessary part, it accepted respondents' long-pressed and erroneous argument that the Apology Resolution endorses key *legal* predicates to Native Hawaiian land claims.

ARGUMENT

I. THIS COURT HAS JURISDICTION

In their merits brief, as in their brief in opposition to certiorari, respondents focus mostly on avoiding this Court's review on the merits. As before, they urge this Court not to review the Hawaii Supreme Court's analysis of the federal Apology Resolution because, they say, that court's judgment rested on adequate and independent state law grounds. That jurisdictional argument fares no better now than it did at the petition stage.

Under the plain-statement rule of *Michigan* v. *Long*, which respondents all but ignore, this Court presumes jurisdiction over a federal ground for a state-court judgment unless the state court "indicate[d] clearly and expressly" that the judgment was "alternatively based on bona fide separate, adequate, and inde-

pendent [state] grounds." 463 U.S. at 1041. Any ambiguity is resolved in favor of this Court's jurisdiction. As we have explained, the Hawaii Supreme Court is acutely aware of that rule and has not hesitated in past opinions to include such a plain statement in order to preclude further review by this Court. *See* Pet. Br. 21-22 n.11.

The court chose not to do that here, and for good reason: the principles of federal law that it (erroneously) derived from the Apology Resolution formed an essential basis for its judgment. The court acknowledged this point throughout its opinion, as discussed in greater detail in our opening brief (at 21-23, 33). For example, it found that the Resolution not only supported issuance of the injunction, but in fact "*dictate[d]* that the ceded lands should be preserved." Pet. App. 85a (emphasis added). And in excusing respondents' failure to file suit years earlier, the court held that, but for the Apology Resolution, their claims would have lacked a legal basis: "[I]t was not until the Apology Resolution was signed into law ... that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose," and it was therefore "not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis." *Id.* at 62a-63; *accord id.* at 58a-59a, 99a; *see also id.* at 41a ("we ... hold that the Apology Resolution and related state legislation ... give rise to the State's fiduciary duty to preserve the corpus of the public lands trust"). In short, the Hawaii Supreme Court did include a plain statement about the jurisdictional basis for its judgment, but it is the opposite of the one needed to defeat the *Michigan* v. *Long* presumption.

Respondents nonetheless argue that, although the Apology Resolution may have been critical to the

judgment, the court relied on it "simply to support its factual determination that Native Hawaiians have unresolved claims to the ceded lands." Resp. Br. 21. This argument is implausible because, at respondents' urging, the Hawaii Supreme Court relied on the Apology Resolution for its *legal* conclusions and made them essential elements of its judgment. As that court itself confirmed (in a passage that respondents do not cite), "our holding is grounded in Hawai'i and *federal law*" (Pet. App. 82a n.25 (emphasis added)) not, as respondents contend, in state law alone, informed only by congressionally recognized "facts." And the Hawaii Supreme Court's reliance on the Apology Resolution as a source of controlling law, rather than as a mere recitation of historical facts, becomes even clearer upon close examination of the court's decisional logic.

For many years before the Apology Resolution was enacted, Native Hawaiian groups had of course asserted "claims" to the ceded lands.[1] Congress's acknowledgment of that well-known fact could not logically have led the Hawaii Supreme Court to conclude, as it did, that the Apology Resolution "dictates" a ban on land sales and serves as a *sine qua non* of respondents' trust-law claims. Instead, the court accepted respondents' argument that the Apology Resolution

[1] *See, e.g., Akaka Bill: Native Hawaiians, Legal Realities and Politics as Usual*, 24 U. Haw. L. Rev. 693, 703 (2002) (stating that, between 1959 and 1978, "[n]ative political groups ... brought land claims based on aboriginal rights"); *Native Hawaiian Rights Handbook* 40 (Mackenzie ed., 1991) ("Ultimately, Native Hawaiians seek return of Government and Crown Lands from both the state and federal governments."); *id.* at 91 (citing 1988 resolution from a Native Hawaiian Rights Conference calling for return of all ceded lands to Native Hawaiians).

"changed the *legal* landscape and restructured the *rights and obligations* of the State" (Pet. App. 27a (emphasis added)), on the grounds that it

> expressly recognized, *inter alia*, that: (1) the overthrow of the Kingdom of Hawai'i was *illegal*; (2) the taking of crown, government, and public lands of the Kingdom was *without consent* or compensation; and (3) "the indigenous Hawaiian people *never directly relinquished* their claims ... over their national lands to the United States."

Id. at 21a (emphasis added) (quoting Apology Resolution); *see id.* at 33a (Resolution "clearly acknowledg[ed] the illegality of the overthrow"); *id.* at 85a ("a plain reading of the Apology Resolution" recognizes "unrelinquished claims over the ceded lands, which were taken without consent or compensation"); *id.* at 88a ("the ceded lands were illegally taken from the [N]ative Hawaiian monarchy").

These propositions are legal, not factual. They concern whether the displacement of the Kingdom with the Republic of Hawaii was lawful; whether the Republic could legitimately speak for "the indigenous Hawaiian people"; and whether the Republic could thus grant "consent" on behalf of Native Hawaiians to the "relinquish[ment]" of governmental and crown lands to the United States in 1898. In resolving those issues, the Hawaii Supreme Court construed the Apology Resolution to establish, as a matter of federal law, that the overthrow was illegal; that (contrary to Congress's judgment in 1898) the Republic could not consent on behalf of Native Hawaiians to the cession of these lands to the United States; and that the claims of Native Hawaiians were then and are now "unrelinquished."

These propositions of federal law are also essential components of the court's judgment. Respondents stressed below that the Apology Resolution was critical to this case because it "identified the cloud on the title to these lands resulting from the illegalities surrounding their transfer to the United States" and indeed "provide[d] substantial support for the conclusion that Native Hawaiians ... have 'complete and perfect title' to the ceded lands." J.A. 127a-128a. Respondents likewise treated the Apology Resolution as a core component of their breach-of-trust claim. They reasoned that the State cannot meet its trust obligations if it "transfer[s] property whose *ownership has been put into question by federal enactments*." J.A. 119a (emphasis added).[2]

Only because it agreed with respondents on these points did the Hawaii Supreme Court conclude that "the State's explicit fiduciary duty to preserve the corpus of the public lands trust" did not arise "until the Apology Resolution was signed into law on November 23, 1993." Pet. App. 62a-63. In other words, the court

[2] Although respondents contend (Br. 22-23) that their 1995 complaint referred only in passing to the Apology Resolution, the complaint in fact argued that, despite Congress's "acknowledg[ment] ... of the illegal overthrow," the State "has been illegally alienating ceded lands which came from the Kingdom of Hawaii and the [Native] Hawaiian people ... without regard for the claims of [Native] Hawaiians to those lands." J.A. 32a (internal quotation marks omitted); *see also* J.A. 36a. As explained in our opening brief (at 12), respondents' later advocacy emphasized the Apology Resolution far more than the complaint did. Although respondents assert that their claims never "evolve[d]" in favor of heavier reliance on the Apology Resolution (Br. 23), their own briefs reprinted in the Joint Appendix (at 98a-148a) and quoted in the text here belie that assertion.

concluded that Congress's declaration of illegality gave rise, for the first time, to respondents' breach-of-trust claim. Respondents argue at length that the State's trust obligations toward the ceded lands (which run to all the people of Hawaii, and not just Native Hawaiians) arise from state law, even though respondents elsewhere concede that the "ceded-lands trust was established by federal law and is therefore ... a 'federal trust.'" Resp. Br. 47.[3] But no matter how the trust is characterized, the essential point is that respondents argued below and the Hawaii Supreme Court held that the legal determinations in the Apology Resolution are integral to their breach-of-trust claim. Having persuaded the court to adopt that conclusion on these federal legal grounds, respondents can hardly be heard now to disavow those same federal grounds as an essential basis for the challenged injunction.[4]

[3] *See also OHA* v. *State*, 133 P.3d, 767, 784 (Haw. 2006) (Hawaii constitution imposes duty "to hold ceded lands in accordance with the § 5(f) trust provisions"); *Pele Defense Fund* v. *Paty*, 837 P.2d 1247, 1264 (Haw. 1992).

[4] The Hawaii Congressional Delegation *amici* correctly note that the Hawaii Supreme Court "relied upon" (Br. 15) the Apology Resolution in deciding this case, and that point confirms this Court's jurisdiction. It is incorrect, however, to say that the Apology Resolution was "not simply an apology" (*id.* at 12) (internal quotation marks omitted). *See, e.g.*, 139 Cong. Rec. 26,392, 26,428 (1993) (statement of Sen. Inouye) (responding to question from Sen. Gorton about whether passage of Resolution would give Native Hawaiians "rights or privileges or reparations or land or money communally that are unavailable to other citizens of Hawaii": "[T]his is a simple resolution of apology .... It is a simple apology."); S. Rep. No. 103-126, at 35 (1993) (Resolution "will not result in any changes in existing law"); *see also* Pet. Br. 27-30; U.S. Amicus Br. 23-28.

Again, under the *Michigan* v. *Long* presumption, this Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." 463 U.S. at 1040-1041 (emphasis added). What is "clear from the face of the opinion" here is that any state law ground is not independent of the federal law grounds.[5] But if there were any question on that point, it would be resolved in favor of this Court's jurisdiction. Respondents nowhere address that familiar rule of practice, let alone explain how it could accommodate their request to dismiss certiorari for lack of jurisdiction.

Finally, respondents suggest (Br. 33) that if "there is any ambiguity as to whether the decision below rested on state law or federal law," the "appropriate course would be to vacate the Hawaii Supreme Court's judgment and remand the case for further proceedings[.]" The State agrees that vacatur is appropriate, but only after this Court resolves the federal law issues raised by the state court's judgment. Again, that is the standard course whenever "the adequacy and independence of any possible state law ground is not clear." *Michigan* v. *Long*, 463 U.S. at 1040-1041; *see id.* at 1039-1040 (ruling that mere "[v]acation and continuance

[5] In addition, the asserted state law grounds are not even "adequate" to sustain the judgment under review because they are irreconcilable with federal law, as discussed in Section II below. *See also* Pet. Br. 24-25; *see generally Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917) (state law ground cannot be "adequate" for these purposes if it is "so certainly unfounded that it properly may be regarded as essentially arbitrary").

for clarification," without resolution of the federal legal questions, would be "unsatisfactory because of the delay and decrease in efficiency of judicial administration"); *Coleman* v. *Thompson*, 501 U.S. 722, 732-733 (1991) (describing pre-*Long* remand approach as "burdensome" and "unnecessary"); *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995) (similar); *cf. Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378 (1984) (per curiam) (cited at Resp. Br. 33) (summarily remanding where it appears that the state court issued no significant opinion accompanying its order).[6]

II. THE HAWAII SUPREME COURT'S JUDGMENT CONFLICTS WITH FEDERAL LAW

The Hawaii Supreme Court was wrong to rely on federal law as a basis for the challenged injunction, be-

[6] Respondents claim that the effect of the challenged injunction could be eliminated "by an act of the Hawaii Legislature that definitively resolves [Native Hawaiian] claims." Br. 28. This is inaccurate in several respects. First, the Hawaii Supreme Court retains full authority to decide for itself when and if those claims have been "definitively resolve[d]," and its views on that subject may not coincide with those of the Legislature. *See* Pet. App. 98a, 100a; *see also* Resp. Br. 7 (quoting earlier Hawaii Supreme Court decision ordering legislature to demonstrate concern for Native Hawaiians). Also, because the court viewed reconciliation as a joint federal and state project *see, e.g.*, Pet. App. at 32a, it is by no means clear that the court would view unilateral state legislative action as a "definitive resolution" of anything. Most important, despite respondents' contrary suggestion (Br. 28), the injunction hamstrings the state-level political process for the foreseeable future by forbidding the political branches to decide, for example, that they will permit sales of specific parcels of ceded lands for purposes specifically sanctioned in the Admission Act (as they did with the Leiali'i parcel) before any full and final resolution of the multi-year "reconciliation process."

cause federal law in fact forecloses the injunction. Respondents' efforts to defend the court's analysis on the merits are untenable, as are the waiver theories they invoke to avoid this Court's review.

A. The Judgment Should Be Reversed Because The Apology Resolution Does Not Repeal The Preexisting Federal Bar On Native Hawaiian Claims To The Ceded Lands

Respondents' brief is a case study in perverse characterizations. As discussed, they first try to avoid this Court's jurisdiction altogether by implausibly recharacterizing as "factual" the core legal propositions the Hawaii Supreme Court derived from the Apology Resolution. In this section, we address respondents' related and equally quixotic claim that the principles underlying the Hawaii Supreme Court's decision were "moral" and "political" and not "purely legal." As discussed below, that characterization cannot serve its intended purpose: insulating the court's logic from the preemptive force of federal law. To illustrate why respondents must resort to that improbable argument, however, we first review the Supremacy Clause defense they wish to avoid meeting on its legal merits. *See* Pet. Br. 31-46.

As noted, the Hawaii Supreme Court accepted respondents' position that, under the Apology Resolution, the overthrow of the Kingdom was illegal, the Republic's cession of these lands was therefore illegitimate, and the title the United States transferred to the State in the Admission Act was "clouded" as a result.[7] *See*

[7] The concept of "clouded title" suffused respondents' state court advocacy, and the Hawaii Supreme Court recited that phrase repeatedly in describing respondents' successful legal ra-

pp. 7-8, *supra*. Respondents stopped short of asking the Court to rule definitively that the Native Hawaiian community owns the ceded lands outright because existing state precedent deemed that ultimate question nonjusticiable. J.A. 128a. That ultimate question, respondents conceded, would have to be resolved out of court, as part of the "reconciliation process."

Respondents argued, however, that the court should nonetheless enter an injunction because the Apology Resolution "provide[s] substantial support for the conclusion that Native Hawaiians ... have complete and perfect title to the ceded lands." J.A. 128a (internal quotation marks omitted).[8] In other words, respon-

tionale for injunctive relief. *See, e.g.*, Pet. App. 22a, 26a, 58a; *see generally* Pet. Br. 31-33 & nn.17-18. Despite respondents' perplexing argument to the contrary (Resp. Br. 39-40), the court adopted, rather than rejected, that rationale: namely, the notion that the Apology Resolution delegitimized the cession of these lands by the Republic of Hawaii and thereby conferred new legitimacy on Native Hawaiian claims to these same lands. Just as respondents argued that the Resolution "changed the legal landscape" by "cloud[ing]" the "title to the ceded lands" (Pet. App. 26a-27a), so too did the Hawaii Supreme Court hold that the Resolution "dictate[d]" entry of the challenged injunction by "recogniz[ing] that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation." *Id.* at 85a; *see also id.* at 32a-34a, 41a, 58a, 69a, 75a, 79a, 98a-99a.

[8] Indeed, even as late as in their brief in opposition to certiorari, respondents contended that "[j]ust as in this case, the Pueblo Indians [in *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919)] were 'not seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers *in disregard of their full ownership*[.]' " Opp. 23 n.9 (emphasis added) (describing similarities between this case and *Lane*, in which the Pueblos also claimed "complete and perfect title" (249 U.S. at 113)); *see also id.* at 13 (describing claims

dents asked for an injunction on the ground that their underlying legal theory based on the property law concept of "complete and perfect title"—had potential merit. They elaborated: "Just as a person who knowingly possesses stolen goods is not free to alienate those goods, but must try to return them to their rightful owner, the State is no longer free to transfer or sell the Ceded Lands." J.A. 136a. The court granted the requested injunction.

The Apology Resolution could not support let alone "dictate[]" (Pet. App. 85a) this train of legal reasoning unless it repeals at least two prior congressional enactments: (i) Congress's 1898 decision in the Newlands Resolution to accept "the absolute fee and ownership" to these lands from the Republic of Hawaii and (ii) Congress's 1959 decision in the Admission Act to transfer to the State "the United States' title" to all lands "that were ceded to the United States by the Republic of Hawaii."[9] Specifically, if the Apology Resolution does *not* repeal the Newlands Resolution and the Admission Act, those prior enactments undermine a critical step in the logic of the challenged injunction because, as a matter of federal law, they foreclose any claim "that Native Hawaiians ... have complete and perfect title to the ceded lands." J.A. 128a (internal quotation marks omitted). And because, as discussed,

as "still-live"), 21-22 n.8 ("major, valid, unresolved claims of a native people to public lands").

[9] *See* Joint Resolution To Provide For Annexing The Hawaiian Islands To The United States, Res. No. 55-55, 30 Stat. 750 (1898) ("Newlands Resolution") (Pet. Br. App. 1a-3a); Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act") (Pet. App. 113a-132a).

that premise was essential to the injunction, the injunction must fall if the premise is false.

The question on the merits, therefore, boils down to whether the Apology Resolution did repeal these prior enactments whether, in respondents' words, it "changed the legal landscape" in ways that "restructured the rights and obligations of the State." Pet. App. 26a-27a. It did not. "[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (internal quotation marks omitted). Here, the Apology Resolution reveals no "clear and manifest" intention to repeal Congress's prior determinations that the United States obtained perfect and unchallengeable title to the ceded lands and that it successfully transferred that title to the State upon its statehood. Instead, the Apology Resolution should be read for what it is: a statement of regret with no substantive legal consequences.

Significantly, fifteen years after filing suit on the theory that "the State is not the true and legal owner of the ceded lands" (Trial Ct. Exh. 143), at 1, respondents no longer dispute that the Supremacy Clause bars that very contention as well as any competing claims of Native Hawaiian legal title. Instead, they claim that the Hawaii Supreme Court did not "rel[y] solely on the existence of *legal* claims by Native Hawaiians to the ceded lands," and that it relied in part on non-legal "moral and political claims." Resp. Br. 37-38, 40. And respondents contend that, if it had so chosen, the court could have avoided a Supremacy Clause problem by jettisoning any legal rationale and relying instead on such "moral" or "political" grounds.

This is a perplexing argument. As noted, respondents obtained this injunction on the theory that the Apology Resolution conferred new legitimacy on Native Hawaiian claims of legal entitlement to the ceded lands. They phrased those claims in property-law terms, asserting that Native Hawaiians have "complete and perfect title" to the lands (J.A. 128a) and analogizing the State to "a person who knowingly possesses stolen goods" and is therefore "not free to alienate those goods, but must try to return them to their rightful owner" (J.A. 136a).[10] These are straightforward legal concepts, not expressions of moral or political sentiment.

Respondents are careful not to contend that the Hawaii Supreme Court viewed these underlying claims of legal title as superfluous to its judgment. They argue that the Hawaii Supreme Court relied on moral and political considerations *in addition to* legal ones, and

[10] *See also* Private Pls.' [Written] Closing Arg. 28, ROA V. 19, at 200 (Dec. 17, 2001) ("The United States, in the Newlands Resolution, purported to obtain title to the ceded lands by cession from the Republic of Hawaii.... Thus, an important inquiry is whether the United States *received good title* to the ceded lands from the Republic of Hawaii.") (emphasis added and omitted); *id.* at 48, ROA V. 19, at 220 ("*Lane* [v. *Pueblo of Santa Rosa*, *supra*] is instructive because Hawaiians and the Pueblo Indians of Santa Rosa, unlike most American Indian tribes, have a claim to *complete ownership of their lands*, not just possessory title[.]") (emphasis added); OHA Supp. P.S.J. Opp. 21, ROA V. 3, at 38 (Mar. 27, 1996) ("the Apology Bill of 1993 contain[s] clear and plain language that Congress regards native Hawaiians as the ultimate owners to their ceded lands"); OHA Hawaii S. Ct. Opening Br. 26 ("The uncertainties regarding the *legitimacy of the transfer of land in the Newlands Resolution* have been cleared up by the explicit findings by the U.S. Congress in the 1993 Apology Resolution.") (emphasis added).

they speculate that the Court *could* have dispensed with legal reasoning altogether had it so chosen. Resp. Br. 37-40. But respondents do not dispute that, quite apart from any non-legal considerations the court may have deemed relevant, the court's actual judgment relied in substantial part on a premise about the new legitimacy that the Apology Resolution supposedly bestowed on Native Hawaiian claims of legal title. Because that premise was both necessary to the judgment and wrong as a matter of federal law, the judgment cannot stand.

Finally, there would be no merit to respondents' argument on this point even if they *did* contend that the judgment below rested on *purely* "moral" and "political" considerations rather than legal ones. As its name suggests, the Hawaii Supreme Court is a court, not a legislature. Like any court, it is presumed to act on the basis of legal findings, not raw "moral" or "political" instincts.[11] That presumption could be overcome

[11] *See, e.g.*, *State* v. *Mallan*, 950 P.2d 178, 192 (Haw. 1998) (plurality opinion) ("It is not within our role to usurp the responsibilities of the legislature.... Principles of due process and/or the police power should not be used as vehicles for importing a particular social philosophy into the Hawai'i Constitution."). Although respondents correctly note that "moral and political claims have served as the basis for Congress to grant lands" to aboriginal peoples (Br. 41), Congress is of course a political body, and the former Indian Claims Commission, which respondents also cite (Br. 40), was a politically constituted administrative agency. Finally, respondents' reliance on *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), is also bewildering. That case involved a claim for just compensation under the Takings Clause; one of the key issues was "whether the Court of Claims' inquiry in this case was guided by an appropriate *legal* standard"; and the Court "conclude[d] that it was." *Id.* at 416 (emphasis added).

only by the plainest of statements that the court abandoned this traditional limitation on its judicial role. There is no hint of any such statement here; the court acted as a court. Any contrary interpretation would convert a judgment that is merely wrong as a matter of federal law into one that would be quite literally lawless.[12]

B. Respondents' Waiver Arguments Are Baseless

Alternatively, respondents urge the Court simply to ignore the legal effect of the pre-1993 federal enactments because, they say, that issue was improperly preserved in the state courts and falls outside the scope of the question presented. These waiver arguments are baseless.

[12] As we have discussed, federal law not only precludes any remedy premised on the possible validity of Native Hawaiian title, but also constrains a state court's authority to impose a policy-based preference for one of the five Section 5(f) trust objectives at the expense of the others. *See* Pet. Br. 46 n.26 (citing, *inter alia*, *Lassen* v. *Arizona*, 385 U.S. 358 (1967)); *see also* U.S. Amicus Br. 20-23. For example, a state court could violate the Admission Act if, by subordinating all other Section 5(f) objectives to Native Hawaiian interests, it disregards "the constitution and laws" of the State (*see* Pet. App. 116a), which expressly *authorize* the sale ceded lands in pursuit of such objectives as "farm and home ownership on as widespread a basis as possible," Haw. Const. art. XI, § 10; *see* Pet. Br. 6 & n.3. Those additional federal law constraints, in addition to those discussed in the text, would bind the state courts in any proceedings on remand.

1. The legal significance of the pre-1993 federal enactments was fully presented to the state courts

Respondents contend that the State did not "argue before the Hawaii Supreme Court that, because the federal government had absolute title to the ceded lands pursuant to the Newlands Resolution (or similar federal statutes), an injunction would be improper." Resp. Br. 36. That is flatly wrong. In fact, the State argued at length to the Hawaii Supreme Court exactly what it is arguing here: that longstanding federal law bars any Native Hawaiian claims of legal title to the ceded lands and that nothing in the Apology Resolution changes that conclusion.

For example, in response to respondents' "cloud on the title" argument, the State explained to the Hawaii Supreme Court that the title the United States obtained in 1898 could not have been impaired because, as a matter of federal law, "Congress can take any and all ... aboriginal rights in land without compensation." State's Hawaii S. Ct. Br. 52 (citing, *inter alia*, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955)). Relying on the Newlands Resolution in particular, the State elaborated:

> "By the ... the Newlands Resolution, of July 7, 1898, Congress accepted the cession by the Republic of Hawaii to the United States of all public lands belonging to the government of the Hawaiian Islands. Thus, upon annexation, all public lands in Hawaii became the property of the United States." Whether or not Congress's decisions were wise or proper is simply not (with all respect) a matter for inquiry by this Court.

Id. at 48 (indentation and internal citation omitted; quoting *Fasi* v. *King (Land Commissioner)*, 41 Haw. 461, 466 (1956)).[13] And in reply, respondent OHA acknowledged the State's argument that "the political question doctrine prohibits the judiciary from issuing the injunction ... because Congress recognized the Republic of Hawai'i as the rightful government of Hawaii in 1898" *i.e.*, in the Newlands Resolution. J.A. 121a. Inexplicably, OHA now denies that the State made precisely that argument.

The State further explained to the Hawaii Supreme Court that, when Congress enacted the Admission Act in 1959, it "exercised [its] plenary power [over aboriginal lands] by transferring the Ceded Lands to the State along with the power to sell." State's Hawaii S. Ct. Br. 55; *see also id.* at 56 (explaining that " '[t]he power of Congress' " to " '[e]xtinguish[] ... Indian title based on aboriginal possession' " is " 'supreme' ") (quoting *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941)). The State thus observed that, at bottom, respondents' breach-of-trust arguments "attack[] the United State[s'] acquisition of the Ceded Lands" as well as "the Admission Act" and prior federal legislation. *Id.* at 63. Such an attack, the State added, was not just implausible on the merits, but procedurally inappropriate, because respondents had never made "the United States ... a party to any such action." *Id.*

[13] The State likewise argued that controlling precedent "foreclose[s] judicial inquiry into the State's title to the Ceded Lands" and that even if the Republic's disposition of the lands could be considered " 'confiscatory in nature, [a] court has no authority to declare it to be invalid,' " because " '[t]he subsequent derivation of the title by the United States is clear.' " *Id.* at 41 (quoting *Territory* v. *Kapiolani Est.*, 18 Haw. 640, 645-646 (1908)).

The State thus argued that even though "the question of whether the Admission Act empowers the State to sell Ceded Lands is properly before the Court," the question of "[w]hether the Admission Act was wise or proper is not." State's Hawaii S. Ct. Br. 48. And it explained that any state law basis for opposing State's authority to sell ceded lands would "conflict[] with the undoubted power to sell under the Admission Act and raises issues as to whether the compact is being changed without consent of Congress." *Id.* at 25-26 (internal quotation marks omitted). In reply, respondents acknowledged this Supremacy Clause argument but opposed it on the (implausible) ground that the Apology Resolution had implicitly repealed the prior federal legislation: "The State's argument ... that the 'compact' in the Admission Act 'is being changed without consent of Congress' is bizarre, because it was Congress itself that enacted the Apology Resolution and thus caused the change in the legal regime that governs these lands." J.A. 114a.[14]

[14] The State made the same points throughout this litigation. *See, e.g.*, Defs.' Mot. for P.S.J. 13-14, ROA V. 1, at 87-88 (Dec. 15, 1995) ("Without dispute, the Newlands Resolution, the Organic Act, and the Admission Act ... reflect that public trust lands ... are subject to the management and disposition of the Hawaii government."); Defs.' Supp. Mot. for S.J. 10, ROA V. 3, at 336 (Mar. 19, 1996) ("[The Apology Resolution] does not ... expressly or by implication purport to reverse Annexation or repeal any part of the Admission Act[.]"); Defs.' Mot. in Limine 5 n.3, ROA V. 10, at 204 n.3 (Aug. 9, 1999) ("The 9th Circuit has already rejected the argument that the agreements made in 1898 [the Newlands Resolution] and 1900 [the Organic Act] were invalid because they were made by 'illegal revolutionaries.' "); Defs.' Trial Mem. 39, ROA V. 16, at 44 (Nov. 7, 2001) ("Old treaties between the United States and the Kingdom of Hawai'i, all have been abrogated by Act of Congress in the Newlands Resolution. There can be no question of Congress's

In short, the State made the same Supremacy Clause argument in the state courts that it is making here, and it relied explicitly on the Newlands Resolution and the Admission Act. *See also* U.S. Amicus Br. 32 ("In the state courts, the State raised a federal defense to respondents' demand for an injunction."). The Hawaii Supreme Court acknowledged that argument (*e.g.*, Pet. App. 82a & n.26) but then ignored it. As the Solicitor General explains, "[t]he only conceivable basis for the state supreme court's failure to address that meritorious federal defense was the state court's belief that *another* federal law, the Apology Resolution, eliminated that defense. Because that premise was wrong, federal law precludes respondents from showing success on the merits and obtaining an injunction." U.S. Amicus Br. 32.

2. The legal significance of the pre-1993 federal enactments is fairly included within the question presented

Respondents also try to evade meaningful review by arguing that issues concerning the legal effects of the Admission Act and the Newlands Resolution fall outside the question presented in the certiorari petition. That, too, is incorrect.

right to do so."); Defs.' Mot. to Dismiss 2, ROA V. 4, at 164 (Mar. 12, 1998) ("When the Republic of Hawaii was annexed to the United States pursuant to the Newlands Resolution ... , these lands became federal lands. *Hawaii v. Mankichi*, 190 U.S. 197, 209-11 (1903)"). Indeed, both parties introduced the Newlands Resolution itself as trial exhibits, Plaintiffs' Ex. 17 & Defendants' Ex. QQQQQ, and the private plaintiffs actually posed the question to the trial court as to whether "the Newlands Resolution ... extinguished the Hawaiians' claim." Private Pls.' [Written] Closing Arg. 30, ROA V. 19, at 202 (Dec. 17, 2001).

The petition for certiorari asks this Court to rule on whether the Apology Resolution "strips Hawaii of its sovereign authority to sell, exchange, or transfer" the ceded lands "until it reaches a political settlement with native Hawaiians about the status of that land." Pet. i.[15] By its terms, that question encompasses whether, as respondents argue, the Apology Resolution "changed the legal landscape and restructured the rights and obligations of the State." Pet. App. 27a. Again, the Apology Resolution could have had that effect only if it repealed Congress's prior decisions to take "absolute fee and ownership of" the ceded lands in 1898 (Newlands Resolution (Pet. Br. App. 1a)) and to "grant[] to the State of Hawaii" that same perfect and unchallengeable title in 1959 (Admission Act § 5 (b)

[15] *See also* Pet. 2 ("[n]othing in the Apology Resolution remotely supports" injunction against land sales pending a "political settlement with native Hawaiians who assert aboriginal rights to that land"); *id.* at 11 (decision under review wrongly "holds that Congress dramatically but silently abrogated key land rights ... that Hawaii explicitly received when it was admitted to the Union in 1959"); *id.* at 12 (Apology Resolution "does not mandate, justify, or even contemplate the imposition of new limits on Hawaii's sovereign authority to sell, exchange, or transfer its lands"); *id.* at 13 (Apology Resolution does not "restrict the State's preexisting and explicit authority to transfer land out of the trust ... in accordance with any of the five purposes set forth in the Admission Act"); *id.* at 15 (state court's analysis of Apology Resolution "raise[s] grave federalism concerns" by "abrogat[ing] the State's sovereign power explicitly granted by Congress ... —to manage and sell or exchange its own public lands within the broad limits set forth in the Admission Act"); *id.* at 16 (same). The Apology Resolution itself underscores the obvious interrelationship among these various enactments by discussing the content, background, and consequences of the Newlands Resolution. Pet. App. 107a-108a (quoting Resolution and noting that it "vested title to the [ceded] lands in the United States").

(Pet. App. 115a)). Thus, this Court cannot logically consider the proper role of the Apology Resolution in this dispute without examining the preexisting "legal landscape" that it supposedly transformed that is, without addressing the effects the Newlands Resolution and Admission Act had on claims of Native Hawaiian title to the ceded lands. A considered analysis of those provisions is thus "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980), and S. Ct. Rule 14.1(a)).[16]

Several additional factors reinforce the same conclusion. First, consideration of the pre-1993 enactments could not subject this Court to any incremental burden in its review of this case, both because those enactments are essential for background in any event and because their meaning is not even disputed. Second, although, if we could file the petition again, we would foreclose respondents' procedural objection by including a fuller exposition of the pre-1993 enactments, the State gained no conceivable advantage by keeping the petition as concise as it was. If anything, fuller presentation of the pre-1993 enactments and their complete extinction of aboriginal title would only have underscored the need for this Court's interven-

[16] *See also Ballard* v. *C.I.R.*, 544 U.S. 40, 47 n.2 (2005) ("[Q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented.") (quoting Stern et al., *Supreme Court Practice* 414 (8th ed. 2002)). Of course, the rule of practice concerning issues "fairly included" within the question presented, S. Ct. Rule 14.1(a), is prudential in any event, not jurisdictional.

tion. There is thus no basis for respondents' inflammatory accusation that the State has "engag[ed] in a classic bait and switch." Resp. Br. 18. Third, respondents likewise identify no respect in which they could possibly have been prejudiced by the fuller exposition of these issues in the State's opening merits brief than in its certiorari petition.

Finally, having granted certiorari, this Court has strong prudential reasons to address the preclusive effects of these pre-1993 enactments on any claim of Native Hawaiian title to the ceded lands. In opposing certiorari, respondents argued that, if this Court reverses the state court's determination that the Apology Resolution "dictates" the challenged injunction (Pet. App. 85a), "on remand the Hawaii Supreme Court would simply reach the very same result (this time without citation of the Apology Resolution) and impose the very same remedy, once again," under state law. Opp. 11.[17] This Court should prevent these pre-announced plans from trivializing its jurisdiction. In holding that the Apology Resolution does not "dictate" an injunction to preserve claims of Native Hawaiian title, the Court should make clear that the Resolution does not repeal

[17] The state law grounds respondents unsuccessfully invoked in opposing certiorari are neither "independent" of the federal law grounds (for the reasons discussed in Section I above) nor even "adequate," because they contradict the Newlands Resolution, the Admission Act, and other pre-1993 enactments. *See* note 5, *supra*. Respondents' invocation of those state law grounds thus opened the door to arguments about the preclusive consequences of these federal enactments for claims of aboriginal title. That issue would therefore be properly before the Court for that reason alone even if it otherwise fell outside the scope of the question presented in the petition (which it does not).

the Newlands Resolution, the Admission Act, or similar pre-1993 enactments; that those enactments foreclose such title claims; and that, as a result, those enactments also foreclose any judicial remedy that, like this one, rests on the potential validity of such claims.

CONCLUSION

The judgment of the Hawaii Supreme Court should be vacated and the case remanded with instructions to dissolve the injunction against the sale, transfer, or exchange of the ceded lands.

Respectfully submitted.

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FEBRUARY 2009

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 07-1372

In the Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the resolution adopted by Congress to acknowledge the United States' role in the 1893 overthrow of the Kingdom of Hawaii strips the State of Hawaii of its present-day authority to sell, exchange, or transfer 1.2 million acres of land held in a federally created land trust unless and until the State reaches a political settlement with native Hawaiians about the status of that land.

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The New Oxford American Dictionary (2d ed. 2005) 24
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In the Supreme Court of the United States

No. 07-1372

STATE OF HAWAII, ET AL., PETITIONERS

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether federal law required or permitted the Supreme Court of Hawaii to enjoin the State of Hawaii from selling lands that the United States obtained in absolute fee upon the annexation of Hawaii in 1898 and granted to the State, to hold in trust, upon its admission to the Union. The issues in this case implicate significant federal interests. The State's title to the trust lands derives from the 1898 Act of Congress annexing Hawaii; the State holds the lands pursuant to a federal trust; and the United States is empowered to enforce the trust's requirements. Hawaiian Statehood Admissions Act (Admissions Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 6 (48 U.S.C. ch. 3 note). In addition, the United States owns approximately 300,000 acres of land in Hawaii, acquired in the 1898 annexation; maintains

sensitive military and scientific installations on trust lands leased from the State; and engages in other land transactions with the State.

STATEMENT

1. a. The United States acquired the land at issue in this case when it annexed the Hawaiian Islands in 1898. Hawaiian Annexation Resolution (Newlands Resolution), J. Res. 55, 30 Stat. 750. The islands had been an independent kingdom until 1893, when the monarchy was overthrown and a provisional government established. Subsequently, in 1894, a Republic of Hawaii was proclaimed, and the United States extended that government official recognition. 13 James D. Richardson, *Messages and Papers of the Presidents* 5958-5959 (1897). The leadership of the Republic subsequently requested that the United States annex Hawaii and accept the cession of all its government-owned lands. In 1898, the United States agreed to the offer, annexed Hawaii as a territory, and accepted the cession of "absolute fee and ownership of all public, Government, or Crown lands." Newlands Resolution Preamble, § 1, 30 Stat. 750.[1] Although the rights to those lands, "all and singular," were "vested in the United States of America," Congress reserved income from the lands "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." § 1, 30 Stat. 750. See generally *United States* v. *Fullard-Leo*, 331 U.S. 256, 265 (1947).

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[1] "Crown lands" were the lands formerly held by the monarchy and passed from sovereign to sovereign, although in 1865 the legislature eliminated the monarch's power to alienate or mortgage these lands. See *State* v. *Zimring*, 566 P.2d 725, 730-731 (Haw. 1977); *Liliuokalani* v. *United States*, 45 Ct. Cl. 418 (1910). "Public" and "government" lands were other lands held by the government.

During Hawaii's 61 years as a territory, the ceded lands remained federal property, although Congress allowed most to be administered by the territorial government. See Hawaiian Organic Act (Organic Act), ch. 339, § 91, 31 Stat. 159. In 1921, Congress set aside a portion of the ceded lands for the benefit of native Hawaiians, through a program of leases and loans. Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108. That statute defined "native Hawaiian" to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." § 201(a)(7), 42 Stat. 108.

Hawaii was admitted to the Union as the fiftieth State in 1959. Congress conveyed to the new State "the United States' title to" the ceded lands, except for certain parcels reserved in federal ownership. Admissions Act § 5(b)-(g), 73 Stat. 5-6. In Section 5(f) of the Admissions Act, Congress directed that the State hold the ceded lands granted to it, "together with the proceeds from the sale or other disposition" of such lands, as a "public trust" for one or more of five enumerated purposes, including "the development of farm and home ownership on as widespread a basis as possible," and "the betterment of the conditions of native Hawaiians" as defined in the Hawaiian Homes Commission Act. 73 Stat. 6; see p. 2, *supra*. See generally *Rice* v. *Cayetano*, 528 U.S. 495, 507-508 (2000).

b. In 1993, Congress adopted and the President signed a joint resolution formally apologizing for the United States' role in the overthrow of the Hawaiian monarchy a century before. Act of Nov. 23, 1993 (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510. Congress "acknowledge[d] the historical significance" of the "illegal overthrow of the Kingdom of Hawaii," and

"apologize[d] to Native Hawaiians on behalf of the people of the United States" for that act. § 1(1) and (3), 107 Stat. 1513. The preamble (the "whereas" clauses) recited in great detail the history of the overthrow of the monarchy and the subsequent annexation, and concluded that it was "proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State * * * and the United Church of Christ with Native Hawaiians." 107 Stat. 1513.

2. This suit involves a tract of land on Maui, the "Leiali'i parcel," that was formerly crown land, see note 1, *supra*, was ceded to the United States at annexation, and has been held since 1959 by the State as part of the trust established by Section 5(f). Pet. App. 20a & n.11.

The Housing Finance and Development Corporation (HFDC), a state agency, has identified the area around the Leilali'i parcel as one with a "critical shortage of housing," and it accordingly wishes to build housing on that parcel. Pet. App. 18a-20a. Because the parcel is part of the Section 5(f) trust, it was managed by the Department of Land and Natural Resources (DLNR). *Id.* at 6a. HFDC obtained approval to transfer the land from DLNR's ownership to its own, and invested millions of dollars preparing to build. *Id.* at 20a-22a.

Any transfer of the Leilali'i parcel out of the trust would involve paying some compensation to respondent Office of Hawaiian Affairs (OHA), an independent state agency. OHA manages the portion of the Section 5(f) trust's proceeds (currently 20%) that state statutes designate for the benefit of "native Hawaiians." Pet. App.

159a-166a; see Haw. Rev. Stat. Ann. §§ 10-3(1), 10-13.5 (LexisNexis 2006); *Rice*, 528 U.S. at 508-509. Accordingly, the state legislature enacted a procedure to compensate OHA for 20% of the Leiali'i parcel's fair market value when transferred. Pet. App. 20a-21a.

While the fair market value was being ascertained, Congress enacted the Apology Resolution. Ten months later, relying on the resolution, OHA demanded that, in addition to paying OHA its 20% share, the state agencies include a disclaimer preserving any native Hawaiian claims to ownership of the ceded lands (of which the Leiali'i parcel is a part). Pet. App. 21a; see *id.* at 206a-207a. HFDC declined to include the requested disclaimer because "to do so would place a cloud on title, rendering title insurance unavailable." *Id.* at 207a.

On November 4, 1994, DLNR transferred the Leiali'i parcel to HFDC for $1, and HFDC tendered to OHA a check for approximately $5.6 million as OHA's 20% share of the fair market value. Pet. App. 21a. OHA's attorney advised, however, that the Apology Resolution had created a "cloud" on the State's title, and OHA refused to accept the check. *Id.* at 21a-22a.

3. OHA and the individual respondents, four individuals of varying degrees of Hawaiian ancestry who seek to sue on behalf of the "Native Hawaiian People," filed suits (later consolidated) in state trial court in November 1994. Pet. App. 139a-142a, 209a. Respondents named as defendants the State, its Governor, HFDC (since renamed), and its officials, all petitioners here. *Id.* at 142a-143a.

a. As described by the Supreme Court of Hawaii, "[a]t the heart of the plaintiffs' claims, before the trial court and on appeal, is the Apology Resolution." Pet. App. 26a. Specifically, "[t]he plaintiffs essentially be-

lieve that the title to the ceded lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished their claims over their ancestral territory and that, therefore, the defendants have a 'fiduciary obligation to protect the corpus of the [p]ublic [l]ands [t]rust until an appropriate settlement is reached between native Hawaiians and the State.'" *Ibid.* The court explained that, although the claim was technically pleaded as one for breach of trust under state law, "the plaintiffs essentially maintain that the Apology Resolution gave rise to their breach of trust claim." *Id.* at 58a; see *id.* at 22a-23a, 212a-213a.

Respondents sought an injunction prohibiting petitioners "from selling or otherwise transferring the Leiali'i parcel to third parties and selling or otherwise transferring to third parties any of the ceded lands in general until a determination of the native Hawaiians' claims to the ceded lands is made." Pet. App. 26a. Respondents alleged that an injunction was proper because, "in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust inasmuch as such transfers would be 'without regard for the claims of Hawaiians to those lands' to whom the State, as trustee, owes a fiduciary duty." *Id.* at 23a.

b. The state trial court entered judgment against respondents. Pet. App. 133a-279a. The court concluded in relevant part that the Apology Resolution "do[es] not prohibit the sale of ceded lands." *Id.* at 258a. The court explained that in the Apology Resolution, Congress "ha[s] recognized past injustices to native Hawaiians, and ha[s] expressed [its] support for native Hawaiian sovereignty and reconciliation." *Ibid.* But the court rejected the contention that the Apology Resolution "cre-

ate[d] a cloud on title," and concluded that "[i]n adopting the Apology Resolution * * * Congress did not create a 'claim' to any ceded lands." *Ibid.*

4. The Supreme Court of Hawaii vacated the trial court's judgment. The court concluded that respondents were entitled to a permanent injunction prohibiting petitioners "from selling or otherwise transferring to third parties (1) the Leiali'i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved." Pet. App. 100a.

That injunction was based on a holding that "the Apology Resolution and related state legislation * * * give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." Pet. App. 41a. The court explained its rationale as follows:

> [T]he language of the Apology Resolution itself supports the issuance of an injunction. * * * [W]e believe, *based on a plain reading of the Apology Resolution*, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations. Equally clear is Congress's "expresse[d] . . . commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, *in order to provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people." Accordingly, *the Apology Resolution dictates* that the ceded lands should be preserved pending a reconciliation be-

> tween the United States and the native Hawaiian people.

Id. at 85a (first and final emphases added; citation omitted). Based on that reasoning, the court concluded that injunctive relief "is proper pending final resolution of native Hawaiian claims through the political process." *Id.* at 98a; see *id.* at 98a-100a.

SUMMARY OF ARGUMENT

The Supreme Court of Hawaii misread the Apology Resolution to reverse a century's worth of federal law and policy governing the United States' 1898 annexation of Hawaii and its acquisition and treatment of ceded lands. The Apology Resolution did not change that body of law, or *any* existing law. Nor did it take the dramatic and disruptive step of stripping the State's authority to sell, exchange, or transfer lands held in the federal trust, which would have been a significant intrusion on the State's authority in this important sphere. Instead, Congress opted simply to express regret for the events of a century before.

I. At the time of the Apology Resolution, as it had for decades, federal law foreclosed two key premises of respondents' case: that the United States acquired the trust lands subject to a cloud on title, and that as trustee of the federal trust the State has a fiduciary duty not to sell those lands until that cloud is removed.

Respondents' purported cloud arises from the manner in which the Republic of Hawaii acquired the crown and government lands. But when *the United States* accepted those lands, it took absolute title, irrespective of their history, as the Newlands Resolution plainly stated. The Organic Act (as well as contemporaneous legislative and executive interpretations) confirmed that the Uni-

ted States' perfect title extended to the entire cession. Respondents' theory depends on the notion that if the Republic of Hawaii acquired the land illegitimately, it could not give the United States perfect title. But at least since the Louisiana Purchase, this Court has held that when the United States acquires territory, determination of the ceding sovereign's ability to pass valid title is a matter for the political Branches, bound up with the powers to recognize governments and make treaties. Neither this Court nor any other court may second-guess those determinations, in a title suit or otherwise. See, *e.g.*, *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829) (Marshall, C.J.). The United States then transferred its unencumbered title to the State, subject only to the federal trust.

Accordingly, under federal law, the state courts may not lock up trust lands based on the perceived need for a political settlement of long-foreclosed land claims asserted by putative successors to the interests of the Kingdom of Hawaii. Nor may they do so based on a perceived state-law "fiduciary" duty to native Hawaiians in that capacity. The State's fiduciary duties as trustee derive from and are bounded by Section 5(f) of the Admissions Act, which established a federal trust and conveyed the United States' absolute title to the corpus. The State's trust responsibilities are not fettered by the sort of external constraints that respondents and the state supreme court have sought to impose. To the contrary, the Admissions Act gives the State authority to sell trust lands, as do the state constitution and statutes. The state court was not free to limit that authority and the State's important interests, especially when doing so would be inconsistent with the federal trust and with the State's underlying federal-law title to the trust corpus.

II. The Apology Resolution did not alter these well-settled principles or intrude on state authority in the manner found by the state supreme court. In the resolution's three short provisions, Congress simply expressed the Nation's regret for past events and support for efforts to seek "reconciliation" in the future. As with other recent apologies for historical events, Congress made no substantive change in the law, as the legislative history confirms. Congress did not commit the United States or the State of Hawaii to negotiate a political settlement over lands to which the United States had long since acquired absolute title. Because the Apology Resolution was just that and nothing more, the state supreme court was wrong in reading the Apology Resolution to contradict a century's worth of law that confirms the United States' valid annexation, and to frustrate the State's power to sell trust lands.

III. The state court's injunction cannot stand. Because the Apology Resolution is no basis for disregarding the effect of the Newlands Resolution, Organic Act, and Admissions Act; because those provisions of law preclude any injunction based on claims to the trust lands, or on a purported fiduciary duty to respect such claims; because there is no indication that Congress intended to intrude on this important sphere of state authority; and because no state-law ground can detract from the force of federally conferred authority over the lands, the injunction should be reversed.

ARGUMENT

CONGRESS'S APOLOGY LEFT UNTOUCHED THE GOVERNING FEDERAL LAW, WHICH PRECLUDES ANY INJUNCTION AGAINST SALE OF TRUST LANDS BASED ON PUTATIVE UNRELINQUISHED CLAIMS TO THOSE LANDS

The Supreme Court of Hawaii held that the Apology Resolution justified depriving the State of authority to alienate the trust lands. But that resolution is entirely hortatory. By contrast, the federal statutes by which the United States took title to the relevant lands and later transferred that title to Hawaii in trust are *not* hortatory, and they make clear that native Hawaiians have no lingering claims to the relevant lands and that the State may alienate those lands pursuant to its federal-law trust responsibilities. Nothing in the Apology Resolution manifests any purpose to alter those longstanding principles, and without a clear manifestation, this Court should not attribute to Congress the intent to constrict the authority conferred on the State in this important area.

I. THE UNITED STATES ACQUIRED ABSOLUTE TITLE AT ANNEXATION AND AUTHORIZED HAWAII TO SELL OR TRANSFER LANDS AS TRUSTEE, CONSISTENT WITH THE TRUST REQUIREMENTS

At the time of the Apology Resolution, any residual land claims by native Hawaiians in their asserted capacity as successors to the interest of the Kingdom of Hawaii were unequivocally barred by federal law, and had been since the United States acquired the lands at the time of annexation. And the State had the power, under both the Admissions Act and state law, to sell trust

lands in furtherance of the federal trust's five statutory purposes.

The state supreme court interpreted the Apology Resolution as undoing that settled legal framework. But as explained below, the absolute title to, and power to sell, the ceded lands was so firmly rooted in federal law that if Congress had intended to upset the status quo in the Apology Resolution, especially in the dramatic and highly disruptive fashion envisioned by the state supreme court, it surely would have said so.

A. In Annexing Hawaii, The United States Acquired Absolute Title To The Ceded Lands

1. The Newlands Resolution and Organic Act preclude challenges to the United States' title

a. The text of the Newlands Resolution annexing Hawaii makes clear that Congress intended to and did acquire absolute, unimpeachable title to the ceded lands. The resolution begins with a preamble acknowledging that the Republic of Hawaii had offered the cession of "the absolute fee and ownership of all public, Government, or Crown lands, * * * and all other public property of every kind and description belonging to the Government of the Hawaiian Islands." 30 Stat. 750. Congress then expressly stated "[t]hat said cession [of the absolute fee and ownership] is accepted, ratified, and confirmed." § 1, 30 Stat. 750. And, removing any doubt, Congress added that "*all and singular the property and rights* hereinbefore mentioned are vested in the United States of America." *Ibid.* (emphasis added).

The Newlands Resolution provided that the federal public-land laws (which permitted homesteading) would not apply to the newly acquired lands, and that "the Congress of the United States shall enact special laws

for [the newly acquired lands'] management and disposition." § 1, 30 Stat. 750. Congress specified that all revenue from the newly acquired public lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.*

b. Two years later in the Organic Act, which established a new territorial government, Congress firmly rejected the possibility of permitting challenges to the United States' ownership of the former crown lands. Section 99 of the Organic Act explicitly declares that the Republic of Hawaii had absolute title to the crown lands as of the date the annexation took effect:

> [T]he portion of the public domain heretofore known as Crown land is hereby declared to have been, on [August 12, 1898], and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.

31 Stat. 161; see *Liliuokalani* v. *United States*, 45 Ct. Cl. 418, 428-429 (1910). Thus, the Organic Act reaffirms that the former crown lands are part of the Republic of Hawaii's cession of "the absolute fee and ownership of *all public, Government, or Crown lands*," which the annexation "accepted, ratified, and confirmed." Newlands Resolution Preamble, § 1, 30 Stat. 750 (emphasis added).

c. If the text of these two provisions left any doubt as to Congress's intention to acquire absolute and unimpeachable title, the contemporaneous interpretations of legislative supporters and of the Executive Branch would remove it.

On several occasions during floor debate on the Organic Act, Senators proposed striking the provision that would become Section 99 (then Section 101). Senators Cullom, Morgan, and Foraker[2] explained at length that the bill's authors had been aware of the controversy surrounding the overthrow of the monarchy. See, *e.g.*, 33 Cong. Rec. 2248 (1900) (statement of Sen. Morgan) (noting that "[t]here are certain lawsuits threatened * * * in favor of the heirs presumptive and otherwise of the crown of Hawaii, set up in antagonism or in opposition to the title of the United States"); *id.* at 2249 (statement of Sen. Foraker) (alluding to the "controversy as to whether or not the republic of Hawaii had become possessed of the fee-simple title to the Crown lands"). Those members confirmed emphatically that Section 99's purpose was to declare that, upon annexation, the former crown lands "became the property of the United States," without any remaining "incumbrance" that the former monarchy might assert. *Id.* at 2248, 2448 (Sen. Morgan). Accord *id.* at 2249 (Sen. Foraker) ("[T]he only purpose of this is to show that, according to our declaration, the republic of Hawaii had become possessed of the fee-simple title to the Crown lands, and that in consequence they passed to the United States and are now the lands of the United States."); *id.* at 2444 (Sen. Cullom) (confirming that Section 99 would settle the question of

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[2] Senator Cullom, the bill's chief sponsor, and Senator Morgan had been members of a Presidentially appointed commission to visit Hawaii and recommend a form of government. Shelby Moore Cullom, *Fifty Years of Public Service* 285 (1911). Senator Morgan had chaired the Senate Foreign Relations Committee when it investigated the overthrow of the Hawaiian monarchy. See S. Rep. No. 227, 53d Cong., 2d Sess. 1 (1894); Apology Resolution Preamble, 107 Stat. 1511-1512. Senator Foraker chaired the Committee on Pacific Territories.

the monarchy's title rather than leave it for judicial determination). Accordingly, not only did the Senate reject attempts to delete Section 99, see *id.* at 2249, 2449, it also tabled an amendment to acknowledge the former Queen's title and to compensate her for a taking, see *id* at 2442-2448.

The strategic significance attached to Pearl Harbor is particularly inconsistent with the notion that the Congress thought it was acquiring imperfect title. The possibility that the United States military might one day lose access to Pearl Harbor (which the monarchy had granted on an exclusive but revocable basis, see Supplementary Convention, Dec. 6, 1884, U.S.-Haw., art. II, 25 Stat. 1400) was a primary motivation for annexing Hawaii. See H.R. Rep. No. 1355, 55th Cong., 2d Sess. 4 (1898) (endorsing annexation as a means to obtain "full power of ownership"); see also *id.* at 101, 103, 105.

The President and the Attorney General, immediately following enactment of the Newlands Resolution, interpreted it to give the United States "'absolute fee and ownership'" of the ceded lands. 22 Op. Att'y Gen. 574, 575 (1899). Indeed, the President ordered that any land transfers made by the Republic of Hawaii after the effective date of the annexation be voided. See 22 Op. Att'y Gen. 628 (1899). The Attorney General recognized that voiding those transfers might leave some of the parties unsatisfied, but he concluded that their claims did not impair the United States' absolute title; instead, the claimants should seek relief from Congress, which could be expected to "do justice to all persons having just claims of this nature." *Id.* at 636.

2. Congress acted within its authority when it precluded challenges to the United States' title

Congress's preclusion of challenges to the United States' title is final. The decisions to recognize the Republic of Hawaii, to accept that government's cession of public lands, and to make Hawaii a part of the United States are quintessentially the sorts of matters confided to the political Branches. See U.S. Const. Art. II, § 3; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (agreeing that such determinations by the Executive Branch are "conclusive on the judicial department"); see also *Baker* v. *Carr*, 369 U.S. 186, 212 (1962).

Thus, even if (as respondents have contended, see Pet. App. 185a-193a, 236a) the transfer of the crown lands from the government of the Kingdom to the provisional government to the Republic of Hawaii was contrary to some principle of international law or the Kingdom's domestic law, the United States government's decisions to recognize the Republic and to accept its cession of absolute fee title in public lands are conclusive and may be revisited only by the political Branches of the United States Government, through legislation (to the extent allowed by the Constitution). Although after some acquisitions Congress has permitted the courts to entertain disputes over title to the new lands, it has done so out of grace or treaty commitment; it may validly decide instead to foreclose future litigation over title to the land it acquires.

This Court has upheld the United States' authority to acquire territory outright. One such case involved West Florida (coastal parts of present-day Louisiana,

Mississippi, and Alabama). In the United States' view, Spain had retroceded that territory to France in a secret 1800 treaty, and France had accordingly conveyed it to the United States as part of the 1803 Louisiana Purchase. Spain, however, remained in possession until 1810; the United States then occupied and later annexed the area. The United States and Spain settled their differences in an 1819 treaty. See, *e.g.*, David P. Currie, *The Constitution in Congress: The Jeffersonians 1801-1829*, at 192-193 & n.17, 195 (2001).

Land claimants who had been granted title by Spain between 1803 and 1810 subsequently brought suit to vindicate their rights to possession. This Court rejected their claims because Congress and the President had unmistakably rejected the claimants' premise—that under the correct interpretation of the 1800 treaty, Spain, not France, was the true owner of West Florida at the time of the Louisiana Purchase, and France therefore could not convey it. *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 302-303 (1829). As Chief Justice Marshall wrote for the Court, once the political Branches had exercised "sovereign power over the territory in dispute," based on their construction of the treaty between Spain and France, the courts must "respect the pronounced will of" the other Branches rather than adopt a competing construction of the treaty. *Id.* at 309. Thus, the Court held, the claimants would not be heard to argue "that the occupation of the country by the United States was wrongful[,] and * * * founded on a misconstruction of the treaty." *Ibid.*

Similarly, in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854), this Court upheld and applied a provision of the 1819 treaty of cession (and an attached declaration) expressly invalidating several grants that the King of

Spain had made, while the treaty negotiations were underway, of lands later ceded by the treaty. The United States had insisted upon extinguishing the grantees' claims in the treaty and declaration because "a claim of th[eir] character, however unfounded, would cast a cloud upon the proprietary title of the United States." *Id.* at 655. Although the Spanish grantees' successors contended that the King lacked power to agree to extinguish their rights in that manner, this Court explained that it would not second-guess the political Branches' exercise of the powers to recognize nations and make treaties, and thus would not examine the competence of the Nation's treaty partner to make the agreement. *Id.* at 657-658

More generally, this Court has held that this Nation's courts will not re-examine the acts of another duly recognized sovereign. See, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918). That is so even when the recognized government is one that "originates in revolution or revolt," because the recognition "validates * * * the government so recognized from the commencement of its existence." *Id.* at 302-303. And the rule applies equally to state courts, as *Oetjen* demonstrates. That case was brought in state court to challenge, under international law, a seizure of personal property by the Mexican revolutionary government. See *id.* at 299-301. This Court rejected the claim and cautioned that because the United States subsequently recognized the revolutionary government, the validity of that government's actions was "not open to reëxamination *by this or any other American court*." *Id.* at 304 (emphasis added); see *id.* at 303.

In both *Foster* and *Doe*, the Court recognized the political Branches' authority conclusively to resolve title

disputes that had arisen before the United States took possession and to declare that the United States held the new territory in fee simple absolute. The same principles apply here: in recognizing the Republic of Hawaii, in asserting and acquiring absolute title to lands ceded by that government, and in expressly extinguishing any competing claim to the crown lands, Congress and the President exercised their constitutional authority to transact with foreign nations and to manage the territory so acquired. The nature of respondents' land claims, which are not individual claims to fee title but collective claims traceable to the Kingdom of Hawaii, confirms that any such claims could be extinguished by federal law. Cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279-282, 285 (1955) (discussing extinguishment of Indian title).

Any contention respondents might make about the legitimacy of the Republic of Hawaii at the time of the cession simply is not judicially cognizable; the United States' original title to the ceded lands is not subject to question on that or any other basis. "It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it." *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823); see also *id.* at 588; *Wilson* v. *Shaw*, 204 U.S. 24, 32 (1907). Nor, *a fortiori*, is it for a state court to interfere with the administration of a federal trust on the premise that such an incompatible title to the corpus might exist.

B. The Admissions Act Granted Hawaii Title To Ceded Lands, With The Express Requirement That Those Lands Be Managed Only In Furtherance Of Five Statutory Purposes

Upon admitting Hawaii to the Union, Congress granted the new State, in trust, the United States' title to some of the lands that had been ceded to the United States in the Newlands Resolution. See Admissions Act § 5(b) and (g), 73 Stat. 5, 6. Congress required that those lands be held in trust and managed for one or more of the five purposes enumerated in Section 5(f). Although Section 5(f) allows the constitution and laws of Hawaii to govern the management and disposal of those lands *within* the federal framework, that provision does not authorize the state courts to restrain the State's trusteeship in a fashion that is inconsistent with the federal grant or that rests on asserted claims or perceived fiduciary duties *external* to the federal trust. The Supreme Court of Hawaii's issuance of an injunction based on "unrelinquished claims" to the trust lands (Pet. App. 32a) represents just such an impermissible restraint on the State's stewardship of the federal trust.

Hawaii was expressly empowered to sell trust lands as part of its duty to manage the federal trust in a manner consistent with the federal grant. That authority, while limited by the federal trust and the Admissions Act, is an important one. In Section 5(f) of the Admissions Act, Congress specified the five purposes for the benefit of which the State must hold, "manage[] and dispose[] of" those granted lands, "the income therefrom," and "the proceeds from the sale or other disposition" of such lands. 73 Stat. 6. Not only does Section 5(f) expressly contemplate selling trust lands (as trusts commonly do), it identifies as one of the trust purposes "the

development of * * * home ownership on as widespread a basis as possible," *ibid.*, which necessarily contemplates selling some land to permit new homeowners. Cf. *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 232-233 (1984) (noting Hawaii's historically low rates of residential fee-simple ownership).

The state supreme court did not dispute that the planned use of the Leilali'i parcel would be entirely consistent with the trust purpose of encouraging more widespread home ownership. Nor did that court contradict the trial court's analysis that, under state law, petitioners possess authority to sell or dispose of ceded lands. See Pet. App. 243a-257a, 259a-262a. Indeed, the supreme court acknowledged—but then did not address—petitioners' argument that they have "the undoubted and explicit power to sell [c]eded [l]ands pursuant to the terms of the Admission Act and pursuant to [s]tate law." *Id.* at 82a (brackets in original) (quoting Defs.-Appellees' Haw. Answering Br. 16).

Any judicially imposed freeze on transfer of trust assets would necessarily contradict Congress's authorization to the State to sell or otherwise dispose of lands to promote the trust purposes, including home ownership, and intrude on that important state authority. A freeze on sales otherwise authorized by state law, based on asserted land claims of native Hawaiians, contradicts the federal scheme even more directly. First, it effectively promotes one of the trust purposes—the welfare of native Hawaiians—over the other four purposes that under both federal and state law are eligible to benefit from the trust, see p. 3, *supra*. Second, it does so based on asserted claims by, and perceived "fiduciary" duties to, native Hawaiians that are external to the federal trust.

Furthermore, the "unrelinquished claims" to trust lands, on which respondents base this litigation, are apparently asserted on behalf of not just native Hawaiians as the Admissions Act uses that term, see p. 3, *supra*, but anyone descended from a pre-1778 aboriginal Hawaiian. See Pet. App. 141a-142a. Section 5(f) does not recognize such a broad-based category of native Hawaiian beneficiaries. Thus, in this important respect as well, respondents' claims and the state supreme court's reasoning are contrary to the Admissions Act.[3]

While Section 5(f) does provide that Hawaii shall manage and dispose of trust lands "in such manner as the constitution and laws of said State may provide," 73 Stat. 6, that provision does not sanction the state court's actions. Congress referred to state law as a way to fill

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[3] In *Rice*, this Court held that such an "ancestral inquiry" concerning eligibility to vote for the trustees of OHA "implicates the same grave concerns as a classification specifying a particular race by name" and therefore violated the Fifteenth Amendment. 528 U.S. at 517. Because the Court concluded that the voting restriction was invalid even if Congress could treat native Hawaiians as it does Indian tribes ("a matter of some dispute"), and because "the validity of the voting restriction [was] the only question [presented]," the Court assumed the validity of the underlying programs administered by OHA for the benefit of native Hawaiians. *Id.* at 518-519, 521-522. As it reaches this Court, this case involves no challenge brought by respondent or otherwise raised below to the constitutionality of special statutory provisions for the benefit of native Hawaiians (especially provisions approved by Congress); the only question is whether the state-court injunction is contrary to the governing Acts of Congress; and, as discussed, the Admissions Act defines "native Hawaiian" much more narrowly than would respondents in asserting claims against the trust land at issue. As in *Rice*, therefore, the Court may assume the substantive validity of Section 5(f) and the state constitutional provisions and laws that implement the Section 5(f) trust, and the Court need not confront the "questions of considerable moment" that it identified in *Rice*. *Id.* at 518.

in the details of the State's federal-law trusteeship obligation, not to authorize a state court to rewrite that trusteeship obligation. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 631 (1989) (phrase "as the State legislature may direct" in the New Mexico Enabling Act does not license the state legislature to disregard the Enabling Act's "express restrictions"); cf. *General Atomic Co.* v. *Felter*, 434 U.S. 12, 17 (1977) (per curiam) (congressionally conferred rights "are not subject to abridgment by state-court injunctions").

II. THE APOLOGY RESOLUTION DID NOT CHANGE THE LAW OR CLOUD THE STATE'S TITLE

As explained above, under federal law as it existed before 1993, respondents plainly could not have shown any entitlement to injunctive relief. The state supreme court, however, concluded that the adoption of the Apology Resolution in 1993 removed those federal obstacles. But the Apology Resolution does not change the preexisting law at all, let alone effect the type of dramatic change that would be necessary for respondents to mount a claim to the trust lands *and*, while they pursue that claim extrajudicially, to preclude the State from using trusteeship powers authorized by the Admissions Act. Nor is there any basis to assume that Congress would so disrupt state authority in this important sphere without saying so clearly.

A. The Apology Resolution's Text Demonstrates That Congress's Apology Was Hortatory, Not Substantive, And The State Court's Reliance On The Preamble Was Erroneous

1. The sole substantive provision of the Apology Resolution uses six verbs: Congress "acknowledges," "recognizes and commends," "apologizes," "expresses"

(a commitment), and "urges." § 1, 107 Stat. 1513. The plain meaning of each of those words demonstrates that Congress was speaking rather than acting—clearing the air rather than changing the law.

Of the six verbs, "apologizes" is the most significant. In ordinary usage an "apology" is simply "a regretful acknowledgment of an offense or failure." *E.g.*, *The New Oxford American Dictionary* 72 (2d ed. 2005) (first definition). That is what Congress did, and all that it did, in the Apology Resolution: it "apologize[d] to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States." Apology Resolution § 1(3), 107 Stat. 1513. As a simple expression of regret, an "apology," in ordinary usage, does not carry a substantive legal effect.

The state court attributed significance to another provision, in which Congress expressed its "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the [n]ative Hawaiian people." Pet. App. 32a (quoting Apology Resolution § 1(4), 107 Stat. 1513) (emphasis omitted; brackets in original). But the reference to "reconciliation"—"action to restore to friendship, compatibility, or harmony," *Webster's Third New International Dictionary* 1897 (1993)—does not in itself entail the recognition or settlement of any claim to land. And of particular relevance here, there is no indication in Section 1(4)'s text, context, or history that Congress thought a "proper foundation for reconciliation" would involve restricting the use or sale of trust lands in anticipation of any "reconciliation." To the contrary, consistent with its status

as an "Apology Resolution," the plain text makes clear that Congress's "acknowledg[ment]" of the consequences of past actions was itself the "proper foundation for reconciliation," not some additional legal restriction.

If Congress *had* possessed the contrary view attributed to it by the state supreme court, it would have needed to change the laws (the Newlands Resolution, Section 99 of the Organic Act, and Section 5(f) of the Admissions Act) by which the United States acquired the ceded lands in fee simple absolute and then conveyed them to the State, subject only to the federal trust. But the Apology Resolution did not amend *any* existing law. See also pp. 28-29, *infra*. Nor did it state that the historical injustice it was examining gave rise to colorable present-day land claims, let alone endorse or permit a freeze on the trust lands or a change in the trust's administration as a way to encourage settlement of any such claims.

Congress would have made any such intent unmistakably plain, given the unprecedented and dramatic consequence of clouding the title of at least all the trust lands, if not all ceded lands. Congress "does not * * * hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and the pachyderm that the state court spotted is one that Congress certainly would not have concealed. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (Congress would not have delegated "a decision of such economic and political significance * * * in so cryptic a fashion."). Nor does Congress lightly strip States of important attributes of their authority, including by clouding title to land that a State is empowered to sell, exchange, or transfer.

Congress made no such clear statement; to the contrary, it affirmatively *disavowed* any such reading of the Apology Resolution in the final section, which is entitled "Disclaimer" and states that "[n]othing in this Resolution is intended to serve as a settlement of any claims against the United States." § 3, 107 Stat. 1514. This disclaimer confirms Congress's intent that the resolution not create a new basis for litigation. See also pp. 27-28, *infra*.

2. The Supreme Court of Hawaii asserted that its interpretation of the Apology Resolution was "[b]ased on a plain reading" of four particular passages from that enactment—but each of those passages is simply a "whereas" clause from the preamble. Pet. App. 31a-32a. As this Court recently explained in a different context, "whereas" clauses cannot bear any such weight: "[W]here the text of a clause itself indicates that it does not have operative effect, *such as 'whereas' clauses in federal legislation* * * *, a court has no license to make it do what it was not designed to do." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2789 n.3 (2008) (emphasis added).

Nor would the "whereas" clauses support the state court's holding in any event. For example, one "whereas" clause (like Section 1(1)) refers to the "illegal overthrow" of the monarchy. 107 Stat. 1512. But nothing in the Apology Resolution states or remotely suggests that the subsequent *Acts of Congress* providing for the United States' annexation of Hawaii and acquisition of absolute fee title to the public lands—the very origins of the sovereignty of what is now the State of Hawaii and its ownership of the trust lands under the Admissions Act—were somehow unlawful. And it is those enactments that foreclose respondents' claim.

The state supreme court also relied in part on a clause that states: "Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." Pet. App. 31a (quoting 107 Stat. 1512). The Apology Resolution's "whereas" clause does not address whether any such claims were *extinguished* rather than "directly relinquished." See pp. 12-19, *supra*.[4]

The state supreme court opined that the latter "whereas" clause compelled it to construe the Apology Resolution's disclaimer provision differently, to harmonize the disclaimer with the "whereas" clause and thereby "give effect to all parts of [the] statute." Pet. App. 33a (citation omitted). But the relevant canon calls

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[4] The state supreme court also believed (Pet. App. 34a) that its interpretation of the Apology Resolution was "supported by" a report entitled "From Mauka to Makai: The River of Justice Must Flow Freely," prepared by officials of the Departments of Justice and the Interior in October 2000, seven years after the Apology Resolution. That contention is wrong. Even if that report had the force of law, or even the status of post-enactment legislative history, which it does not, it did not purport to recognize (or to recommend that Congress recognize) "unrelinquished claims" to trust lands. Nor did it purport to recommend a freeze on the transfer of those lands "pending final resolution of native Hawaiian claims through the political process," as the state court ordered, *id.* at 100a. Rather, the report recommended that Congress "*enact further legislation* to clarify [n]ative Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative [n]ative Hawaiian governing body." *Id.* at 35a (emphasis added; brackets in original; citation omitted). One example of "further legislation," known as the "Akaka Bill," has been considered by Congress in various forms at various times. See H.R. 505, 110th Cong., 1st Sess. (2007) (passed by House); see also Pet. App. 7a n.7, 183a-184a.

for construing all *substantive* parts of a statute so that none lacks force; because "whereas" clauses *always* lack force, there is no basis for construing substantive clauses purely to give effect to the preamble. See 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47.04, at 146 (rev. 5th ed. 1992); accord *Heller*, 128 S. Ct. at 2789 n.3; *id.* at 2826 n.7 (Stevens, J., dissenting). It is axiomatic that a clause in the non-binding preamble cannot turn a non-binding resolution into a substantive one.

B. The Sponsors Of The Apology Resolution Disavowed Any Substantive Revision Of Federal Law

Both the applicable committee report and the lead congressional sponsors of the Apology Resolution represented to Congress that the apology would not have any substantive impact. Those assurances confirm what the text already shows: that the Apology Resolution confined itself to apologizing for the events of a century before, and did not mandate or authorize either a present-day settlement (political or judicial) of claims, or any judicial action with respect to the trust lands based on the perceived possibility of such a settlement.

As Senate rules require, the Senate Indian Affairs Committee's report contained a section cataloguing any changes to existing law that the Apology Resolution would make. S. Rep. No. 126, 103d Cong., 1st Sess. 35 (1993). That section, which contained only a single sentence, stated that "enactment of S.J. Res. 19 will not result in any changes in existing law." *Ibid.*

The legislation's sponsors made similar representations. For example, responding to a question concerning the "operative intention" of the resolution, Senator Inouye of Hawaii (the committee chairman and a chief

sponsor) explained: "[T]his is a simple resolution of apology, to recognize the facts as they were 100 years ago. * * * This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that." 139 Cong. Rec. 26,428 (1993). Senator Inouye similarly confirmed that the "whereas" clauses were not to have operative effect, but "were placed in the resolution for a very simple reason: So that those who are studying this resolution or those students of history in years to come can look back and say that is the way it was in Hawaii on January 17, 1893." *Id.* at 26,427.

Similarly, the House committee chairman, Representative George Miller, confirmed that the resolution "does not confer any new rights [on] native Hawaiians," but rather "invokes the name of the U.S. Government in an apology to native Hawaiians for those actions that were taken." 139 Cong. Rec. at 29,106. And Representative Craig Thomas acknowledged the argument that the resolution would "form the genesis of a call for reparations or a civil lawsuit," but assured the House that "[t]his resolution does nothing to tip the scales in favor of the proponents of litigation; if I thought it did, I would not support it." *Id.* at 29,105.

C. Construing The Apology Resolution To Have Substantive Effect Would Discourage Congress From Re-examining Historical Injustices

As the Apology Resolution illustrates, from time to time Congress determines that it is appropriate to acknowledge past injustices. Congress sometimes does so by legislating appropriate reparations. See, *e.g.*, Act of Aug. 10, 1988, Pub. L. No. 100-383, §§ 1, 105, 102 Stat. 903, 905 (apologizing for, *inter alia*, the internment of Japanese-Americans during World War II and providing

for compensation). And Congress sometimes creates special procedures for redress. See, *e.g.*, Indian Claims Commission Act, ch. 959, § 2, 60 Stat. 1050 (creating tribunal to hear claims by Indian tribes, including claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity").

In most cases, however, Congress chooses a resolution whose sole effect is a moral one: the acknowledgment of a failing and a resolve to do better. These nonbinding resolutions may have both political and historical significance, but they confer no enforceable rights. See, *e.g.*, S. Con. Res. 153, 101st Cong., 2d Sess. (1990) (Congress "expresses its deep regret on behalf of the United States" for the 1890 Wounded Knee Massacre, "recognizes and commends the efforts of reconciliation initiated by the State of South Dakota and the Wounded Knee Survivors Association," and "expresses its commitment to acknowledge and learn from our history, including the Wounded Knee Massacre"); see also S. Res. 39, 109th Cong., 1st Sess. 3 (2005) ("apologiz[ing] * * * for the failure of the Senate to enact anti-lynching legislation"); H.R. Res. 194, 110th Cong., 2d Sess. 4 (2008) ("apologiz[ing] to African Americans * * * for wrongs committed against them and their ancestors who suffered under slavery and Jim Crow").[5]

The Apology Resolution plainly falls into the latter category, and the Supreme Court of Hawaii's decision to

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[5] Unlike the Apology Resolution, a joint resolution signed by the President, these more recent apologies were "concurrent" or "simple" resolutions, but the distinction is not relevant for present purposes; Congress routinely enacts joint resolutions that are unmistakably nonsubstantive. See, *e.g.*, Act of May 18, 2006, Pub. L. No. 109-223, 120 Stat. 374 (joint resolution "[t]o memorialize and honor the contribution of Chief Justice William H. Rehnquist").

treat it otherwise lends force to arguments that Congress should not pass such resolutions because they will foment litigation. Allowing the state supreme court's holding to stand would likely discourage Congress from adopting similar apologies for other historic wrongs, because the necessary preambles rehearsing those wrongs might be taken to create judicially cognizable legal claims. Congress must be permitted the flexibility—which is encroached upon by the decision below—to determine that a particular historical injustice is better addressed by an apology than by recognition of present-day claims or "fiduciary" duties.

III. THE INJUNCTION ORDERED BY THE SUPREME COURT OF HAWAII SHOULD BE REVERSED

The premise of the state supreme court's injunction is that there is a cloud on the State's title to the trust lands, and that until that cloud is resolved through political negotiations the State has a fiduciary obligation not to sell the lands for any purpose, even a purpose expressly authorized by Congress. Federal law establishes, however, that the public trust holds good title to the ceded lands, and that the State as trustee may sell or otherwise dispose of those lands in a manner consistent with the trust instrument. Although the state supreme court concluded that the Apology Resolution "dictates" such an injunction, Pet. App. 85a, as shown above, the Apology Resolution did not change the governing federal law, did not create a cloud on the title to the trust lands, did not amend the statutes authorizing the sale of those lands, and did not displace the State's important authority over the lands at issue. Because the asserted basis for the injunction—the Apology Resolu-

tion—is no basis at all, this Court should reverse the injunction.

In the state courts, the State raised a federal defense to respondents' demand for an injunction. See Pet. App. 82a & n.26; Defs.-Appellees' Haw. Answering Br. 18-23. The only conceivable basis for the state supreme court's failure to address that meritorious federal defense was the state court's belief that *another* federal law, the Apology Resolution, eliminated that defense. Because that premise was wrong, federal law precludes respondents from showing success on the merits and obtaining an injunction.

Respondents suggested at the petition stage that the state court would simply reinstate its holding on state-law grounds. Br. in Opp. 11, 18. That contention is meritless. State law cannot create a cloud on the title by which the United States acquired the trust lands. Nor can state law rewrite the trust purposes established by Section 5(f) or impose fiduciary duties in the administration of the trust lands based on matters external to the federal trust, such as claims of native Hawaiians in an asserted capacity as successors in interest to the former monarchy. Because existing federal law compels the conclusion that there *are* no valid but unresolved claims to the trust lands, any remand would be futile.[6]

* * * * *

The United States and the State of Hawaii have maintained the trust lands for more than a hundred

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[6] The state supreme court did not address the federal defense to the injunction expressly. Because the relevant principles of federal law are made clear in examining the Apology Resolution and the body of law it left intact, however, this Court can and should resolve the case at this stage.

years, and during that time have used the income to better the lot of all Hawaiians, including native Hawaiians. If, as respondents claim, the moral consequences of the events of 1893 call for the public trust to be undone or modified, and for some or all of the trust corpus to be awarded directly to present-day people of Hawaiian descent on that basis, then it must be Congress and the President who make that moral judgment. But Congress and the President have made no such judgment. The state court therefore had no warrant to freeze the ordinary disposition of the trust lands at issue.

CONCLUSION

The judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted.

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DECEMBER 2008

AMICUS CURIAE BRIEF

B632
Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 07-1372

In The Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS,

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

AMICUS CURIAE BRIEF OF ABIGAIL KINOIKI KEKAULIKE KAWANANAKOA IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Amicus Curiae is Princess Abigail Kinoiki Kekaulike Kawananakoa. She submits this amicus curiae brief in support of Respondents, Office of Hawaiian Affairs, et al.[1] Princess Abigail Kinoiki Kekaulike Kawananakoa is the great grand niece of King David Kalakaua and Queen Kapiolani and the granddaughter of Prince David Laamea Kahalepouli Piikoi Kawananakoa and Princess Abigail Wahiikaahuula Campbell Kawananakoa. Her mother, Lydia Kamakaeha Liliuokalani Kawananakoa, in keeping with ancient adoption practices, allowed the infant princess to be raised from an early age by her grandmother, Princess Abigail, as a *punahele* child in the traditions of Hawaiian nobility. This unique upbringing and closeness to the royal legacy of the Hawaiian Monarchy has enriched Princess Abigail Kinoiki Kekaulike Kawananakoa's cultural perspectives that have guided her in her chiefly role, as alii, royal, as evidenced by her tireless commitment towards the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the court. Counsels of Record were notified more than ten days in advance that this brief would be filed.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or her counsel made a monetary contribution to its preparation or submission.

preservation of authentic and traditional Hawaiian culture.[2]

Princess Abigail Kinoiki Kekaulike Kawananakoa is the highest-ranking alii alive today. She is the eldest granddaughter of Prince David Laamea Kahalepouli Kawananakoa, who was designated heir in succession to the Crown of the Hawaiian Kingdom by both King David Kalakaua and Queen Liliuokalani. Princess Abigail Kinoiki Kekaulike Kawananakoa's royal lineage reinforces her genealogical ties to the ruling chiefs of every island - Hawaii, Maui, Molokai, Lanai, Kahoolawe, Oahu, Kauai and Niihau. Senator Daniel K. Inouye noted that Princess Abigail Kinoiki Kekaulike Kawananakoa is "a member of the family with the closest blood ties to the Kalakaua dynasty."[3]

The alii today retain a deep commitment to the welfare of the Hawaiian people. The moral obligation of the alii to the people has always been a matter of the highest priority.

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[2] University of Hawaii President David McClain noted: "Princess Kawananakoa's philanthropic work has been essential to the preservation of Hawaiian culture as a heritage for future generations. Through her dedication and generosity, she has helped to sustain authentic Hawaiian history, music, hula, literature and language", available at http:www.hawaii.edu/cgi-bin/uhnews?20081218151858 (last visited Jan. 15, 2009).

[3] Senator Daniel Inouye, "Anniversary Of Coronation Of King Kalakaua," 129 Congressional Record, 10,098 (April 27, 1983).

The history of service to the people through philanthropy of the alii is a proud heritage of the Hawaiian people. The alii trusts were created to meet the health, educational and other social and spiritual needs of the people.[4] Examples of philanthropic work on behalf of the Hawaiian people established during the monarchy abound in contemporary Hawaii. The alii trusts include The Queens Hospital and St. Andrews Priory School for Girls established by King Kamehameha IV and Queen Emma. Kamehameha Schools` was established by the will of Princess Bernice Pauahi Bishop. Hooululahui and the Kapiolani Medical Center for Women and Children (originally known as the Maternity Home) were established by King Kalakaua and Queen Kapiolani. Queen Liliuokalani established a trust to provide for the care of orphans and other destitute children in Hawaii. The Liliuokalani Educational Society was created to provide for the educational training of young girls. King William Charles Lunalilo created the Lunalilo Home, a charitable trust for the benefit of the poor, the aged and the infirm people of Hawaiian ancestry.

Princess Abigail Kinoiki Kekaulike Kawananakoa would like to make clear at the outset that as the highest ranking living alii, it is her solemn obligation to protect the land illegally taken. She will continue to be an advocate for the interests of the Hawaiian people and to ensure that the State

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[4] Princess Abigail Kinoiki Kekaulike Kawananakoa's philanthropic work is conducted through the Kawananakoa Foundation, Na Lei Alii Kawananakoa, and other eleemosynary institutions.

and Federal governments of the United States endeavor to fulfill its moral and legal obligations to native Hawaiians.

SUMMARY OF ARGUMENT

The Hawaii Supreme Court properly issued an injunction prohibiting the sale or transfer of ceded lands from the public lands trust until claims of native Hawaiians to the ceded lands have been resolved. This is a complex matter that must be understood in terms of Hawaii's unique history as noted by the court below.[5] The State of Hawaii has trust obligations to native Hawaiians that are in the process of being reconciled by the non-judicial branches of government. The trust and moral obligations of the State of Hawaii arise from Hawaii's complex history.

Part of that history involves the manner in which the system of fee simple title to land originated in Hawaii, and later how the land was illegally taken. Prior to contact with Western powers:

> The land, under ancient custom, had been held by the ruling chief alone, and

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[5] "The issues presented in this case have their genesis in the historical events that led to the overthrow of the Kingdom of Hawai'i, the surrender of 1.8 million acres of crown, government, and public lands to the United States, the admission of Hawai'i as a state of the Union, and the creation of OHA and the public lands trust." *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*, 177 P.3d 884, 891 (2008).

> parceled out by him to his followers, subject to return to the ruling chief at the death of the follower, or treason on his part toward his chief. At the death or subjugation of the ruling chief the land reverted to his heir or conqueror for redistribution. Theoretically the ruling chief had the ultimate claim to all the land.[6]

In 1848, after Western contact, a division known as the Mahele divided the lands roughly equally between the king and the chiefs. The king then divided his lands into the crown lands and the government lands.

Ultimately it became necessary in the face of Western pressures to preserve the sovereign's Crown land by making it inalienable. In 1865 an Act of the legislature of the Kingdom of Hawaii codified the sovereign's obligation to preserve the land for the people by making it explicitly inalienable.

In 1893 the Kingdom of Hawaii was overthrown with the assistance of citizens and agents of the United States. To avoid bloodshed, Queen Liliuokalani yielded her authority trusting in the United States to right the wrong.

It took one hundred years, but in 1993 the United States Congress formally acknowledged that

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[6] S.M. Kamakau, *Ruling Chiefs*, (1992 rev. ed.) at 403.

the overthrow constituted an illegal act.[7] The Apology Resolution endorses a process of reconciliation between native Hawaiians the State of Hawaii and the United States.

The Apology Resolution raises the issue of what exactly was "ceded" to the United States and later transferred by the United States to the State of Hawaii. However, in the case of the Crown lands the answer of what was ceded to and transferred from the United States was no title at all. Even Queen Liliuokalani could not have transferred the Crown lands because they were inalienable. The reconciliation process contemplated by the Apology Resolution is necessary in part to resolve the present state of the title to the Crown, and other lands in Hawaii.

There are two distinct trust issues in this case. The first involves the injunction issued below in order to prevent irrevocable consequences from breaches of trust by the State of Hawaii as trustee of the public lands trust. The second trust issue should be of greater concern for this Court since it arises from the United States acquiescing to the "ceding" of land to it through the Newlands Resolution in 1898. The land "ceded" by the Republic of Hawaii to the United States was the very same inalienable land that had been expropriated from Queen Liliuokalani's authority which she had yielded to the

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[7] The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1993 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993)("Apology Resolution").

United States trusting that it would be restored. At the time of statehood the United States transferred this illegally acquired inalienable land to the newly formed State of Hawaii.

The process of reconciliation presents political questions that should be left to the Hawaiian people and the political branches. The injunction imposed by the Hawaii Supreme Court avoids irreparable harm to native Hawaiians while providing the opportunity for reconciliation to take place.

ARGUMENT

THE CROWN LANDS COULD NOT BE CEDED

In the pre-contact period, the Hawaiian people were governed by a great chief, the "Alii Nui" or "Moi" and his chiefs and chiefesses, the "alii". Prior to unification of the kingdom under Kamehameha I the system was island based, and more fluid than the unified constitutional monarchy that ultimately evolved. Hawaiian society was marked by the absence of private ownership of the land, or "aina". *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Communal use of land existed from ancient times, survived the period of Western contact commencing in 1778, and continued until 1848. See, 1 Native Hawaiians Study Commission, Report on Culture, Needs and Concerns of Native Hawaiians, 253 (Report issued pursuant to Pub. L. 96-565, Title III, 1983); also see, Ralph S. Kuykendall, A. Grove Day,

Hawaii: *A History From Polynesian Kingdom to American Commonwealth*, 8 (1948). Communal ownership meant there was no need for a word for private property in the Hawaiian language, and none existed. See, Joint Appendix, 54a.

The land system in the Kingdom was never a feudal system but was based on reciprocal rights and obligations. For example, a commoner was always free to move to another ahupuaa – or traditional pie-piece-shaped division of land stretching from the mountains to the ocean and providing for almost every need of day-to-day subsistence – if the commoner was not treated fairly. The land was inalienable and, in western vernacular, held in trust. The alii acted as benefactor and protector – a role that has continued to this day.

The communal use of land was recognized in the Hawaiian Constitution of 1840 which stated:

> The origin of the present government, and system of polity, is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of the landed property.

The origin of the Hawaiian people's communal right to the land has been noted by the Hawaii

Supreme Court: "It was long ago acknowledged that the people of Hawaii are the original owners of all Hawaiian land." *State by Kobayashi v. Zimring*, 566 P.2d 725, 729 (1977).

Over time the Kingdom of Hawaii adapted to the pressures of Western contact by developing a constitutional monarchy and a system of recorded land title. However, with respect to the sovereign's land, prominent features of the pre-contact period were retained including the obligation to preserve the land for the people as well as the people's traditional rights to the land.

The Mahele (or division) was the process whereby Kamehameha III, divided the kingdom's land. The modern land system of recordable fee simple title was a direct consequence of the Mahele. The *Zimring* Court also commented on the impetus for the Mahele:

> Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's. In adopting a system under which individuals could hold title to land, the public domain, which theretofore had been all-encompassing, necessarily was diminished. *Id.*

Following the Mahele, lands granted to the chiefs and the makaainana were capable of being transferred in fee simple from one individual to another. The Crown and Government lands were retained for the fulfillment of the royal obligations to the people in perpetuity. All of the land remained encumbered by the rights of the makaainana.

In 1864 the Supreme Court of the Kingdom of Hawaii made clear in *In the Matter of the Estate of His Majesty Kamehameha IV*, 2 Haw. 715 (1864) that the King's Crown land was not private property capable of being passed by will to a third party, but must pass to his successor. Following this decision the legislature of the Kingdom of Hawaii confirmed that the sovereign's land was indeed inalienable.

In 1865 the legislature of the Kingdom of Hawaii passed "An Act to Relieve the Royal Doman from Encumbrances and to Render the Same Inalienable". From 1865 until 1893 this Act assured that the land base of the monarchy would not be diminished. Accordingly, Queen Liliuokalani could not diminish the land base regardless of the provocation.

On January 20, 1891 Queen Liliuokalani became Queen of the Kingdom of Hawaii succeeding her brother, the late King Kalakaua. She therefore became vested with the monarch's interest in and to all the rents, profits and emoluments derived from the Crown Lands after deducting the necessary and proper expenses of managing the same. On January 17, 1893, the Queen was deposed by a small group of

self interested interlopers with the assistance of citizens and agents of the United States. This action violated the laws of the Kingdom, the basic precepts of international law, and the treaty obligations between the Kingdom and the United States.

Moreover, at the time of the overthrow the Kingdom of Hawaii and the United States enjoyed normal diplomatic relations. "Of the Great powers of the world, the United States was the first with which Hawaii was able to make a satisfactory treaty." R.S. Kuykendall, *The Hawaiian Kingdom* at 374.[8] During the treaty negotiations, Secretary of State Buchanan was concerned that the posturing of the United States might become an obstacle to consummating the treaty: "They will consider that this would trench too much upon *their rights as an independent nation.*" *Id.* at 376 (Emphasis supplied). The minutes of a conversation involving Secretary Buchanan concerning the relationship of the Kingdom to the United States reveals his view that "Mr. B reiterated the assertion in the fullest manner, that the U.S. Gov't had recognized the Sovereignty of Sand. Is. and should treat her upon the footing of a free & independent nation. ... He explained somewhat at length his views on the subject of a treaty, wh. were just & friendly to the

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[8] Although the first formal treaty was signed in 1849 there were prior arrangements with the United States dating from 1826. 8 *Department of State, Treaties and Other International Agreements of the United States of America 1776-1949*, p. 861 (C. Bevans comp. 1968).

independence & growth of the Hawn. Islands." *Id.* at 378.[9]

Forty-seven years after entering into a treaty with Hawaii, that independent nation --- as a result of an illegal overthrow --- ceased to exist. This marked the first, and only time that the United States engaged in a regime change with a friendly power. The Queen under duress, yielded to the United States. On January 17, 1893 Queen Liliuokalani signed the following under protest:

> I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America, whose minister plenipotentiary, his excellency John L. Stevens, has caused United

---

[9] Upon the occasion of the celebration marking the coronation of King Kalakaua in 1883 Princess Abigail Kinoiki Kekaulike Kawananakoa echoed the spirit of the Hawaiian people of the time by noting, "The people who gathered a century ago brought with them hope for the survival of their country in a troubled world. They wished for a place of respect in that world." 129 *Congressional Record*, 10,098 (Apr. 27, 1983). The Hawaiian peoples hope for survival of their land is no less felt in 2009 than it was in 1883.

> States troops to be landed at Honolulu and declared that he would support the provisional government.
>
> Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate me and the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

Following the overthrow in 1893, the alii, foreigners, and the commoners who had acquired their land as a consequence of the Mahele all retained their land. The conspirators who overthrew Queen Liliuokalani likewise retained their land. The only lands lost in the overthrow were those lands controlled by Queen Liliuokalani for the benefit of the Hawaiian people in perpetuity.

In short, Queen Liliuokalani yielded to the United States Government, not the interlopers, in order to avoid bloodshed and with the fullest expectation that this great and good land would undo the wrong that was done.

Even assuming, *arguendo*, that any valid transfer occurred, the Queen could not transfer the Crown lands because the Crown lands were inalienable by law. It is axiomatic that one can only

transfer to a transferee that which belongs to the transferor. Accordingly, any purported transfer could, *at most*, have only transferred that which was alienable.

THE INJUNCTION WAS PROPERLY ISSUED AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED

The Hawaii Supreme Court was absolutely correct in granting an injunction preventing the transfer of the ceded lands until the claims of native Hawaiians can be resolved. This process of reconciliation has already and finally begun. The State of Hawaii has begun to address these grievances with legislation in 1993 (Acts 340, 354, and 359) and with legislation in 1997 (Act 329).

The lifting of the injunction will not only unreasonably interfere with the reconciliation process, but will result – again – in the loss of land. Without the land there can be no reconciliation. Beginning with the Mahele the land has been lost to foreigners. The people of Hawaii in 1865 had the foresight to render the Crown lands inalienable because not only was the land for the people but because there was the realization that the loss of the land – regardless of whether paid for – would undermine the foundation of what it means to be Hawaiian. To the Hawaiians, land is not fungible but is sacred providing both physical and spiritual sustenance.

Queen Liliuokalani yielded to avoid bloodshed and only yielded to this great country until it could undo the actions of 1893. It would be terribly ironic for this Honorable Court to interfere with the process that may - if not undo the overthrow in 1893- at least lead to a reconciliation of claims so long avoided. As Queen Liliuokalani stated on June 17, 1897 in her Official Protest to the Treaty of Annexation:

> Therefore I, Liliuokalani of Hawaii, do hereby call upon the President of that nation, to whom alone I yielded my property and my authority, to withdraw said treaty, (ceding said Islands) from further consideration. I ask the honorable Senate of the United States to decline to ratify said treaty, and I implore the people of this great and good nation, from whom my ancestors learned the Christian religion, to sustain their representatives in such acts of justice and equity as may be in accord with the principles of their fathers, and to the Almighty Ruler of the universe, to him who judgeth righteously, I commit my cause.[10]

---

[10] In this instance, Queen Liliuokalani's plea was answered and annexation of Hawaii by treaty failed in the Senate. Remarkably this was the second time the Senate rejected annexation by a treaty of cession. Finally giving way to expediency, Congress "annexed" Hawaii by a simple joint resolution, not a treaty between sovereign states.

THE TRUST THAT QUEEN LILIUOKALANI PLACED IN THE UNITED STATES IN 1893 IS NOW RECOGNIZED THROUGH THE APOLOGY RESOLUTION. THIS COURT SHOULD TAKE NO ACTION THAT WOULD JEOPARDIZE THE RECONCILIATION PROCESS.

The case before this Court potentially places native Hawaiians on the verge of a tragic irony. In 1893 Queen Liliuokalani placed her Kingdom in the care of the United States. In 1993 the United States recognized that the overthrow constituted an illegal act and has encouraged reconciliation as well as the resolution of the claims of native Hawaiians to the ceded lands. If this Court were to find that the State of Hawaii has perfect title to the land transferred to it by the United States the process of reconciliation will be over before it has begun. The irony of finding perfect title in the wake of an illegal act when the United States came into possession of land it knew, in part, to be inalienable, while the Queen was at gunpoint, would be the saddest end to one of the saddest chapters in American history.

Such an outcome would be doubly ironic because the Hawaii Supreme Court has found that the State of Hawaii as trustee of the ceded lands has trust obligations under state law to protect the corpus of the trust given the advent of the Apology Resolution. Why would this Court wade into an utterly unique political question, especially one that arises from an admittedly illegal act by the United States itself?

This Court should take no action which has the practical effect of terminating the process of reconciliation set in motion by the Congress.

CONCLUSION

The judgment of the Hawaii Supreme Court should be affirmed so that the reconciliation process dictated by the Apology Resolution may proceed under the direction of the political branches. In the alternative, the writ of certiorari should be dismissed.

Respectfully submitted,

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January 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 07-1372

In The Supreme Court of the United States

STATE OF HAWAII, ET AL.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF OF *AMICUS CURIAE* ALASKA FEDERATION OF NATIVES, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*

AFN is a statewide, nonprofit organization representing over 120,000 Alaska Natives on a diverse range of issues important to the Alaska Native community. Its membership consists of over 244 Alaska Native Village Corporations and tribes, 13 regional, for-profit Native corporations formed under the 1971 Alaska Native Claims Settlement Act and 12 regional, nonprofit tribal consortia. These consortia contract as "tribal organizations" under the Indian Self Determination and Education Assistance Act (ISDEA) to furnish a range of health and social services to their member tribes. AFN is governed by a 37-member Board of Directors composed of a representative from each of the 13 Native, regional, for-profit corporations, representative from each of the 12 regional, nonprofit tribal consortia, and a tribal representative chosen from among the villages in each of the same ANCSA regions. For over four decades, AFN has been the principal forum and voice of Alaska Natives in dealing with critical public policy issues.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Hawaii Supreme Court imposed a moratorium on the disposition of certain state lands pending resolution of the Native Hawaiian land claims. A federal, executive branch moratorium also prevented disposition of Alaska's Statehood Act land selections pending resolution of the Alaska Native land claims. Alaska Natives are frequently cited as the indigenous group most analogous to that of Native Hawaiians when analyzing concepts of federal Indian law and Congress' plenary power to regulate Indian affairs.

The issues in this appeal do not challenge the constitutionality of the state or federal programs benefiting the indigenous peoples of the Hawaiian archipelago[2] or call for the resolution of any principles of federal Indian law as applied to Native Hawaiians. Nonetheless, *amicus* briefs filed in support of Appellants, such as those of the Mountain States Legal Foundation and the Pacific Legal Foundation would have this Court use this occasion to revisit and reverse over 200 years of federal legal precedent.[3] This

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[2] *See* Brief of Appellant ("App.Br.") at (i) and 18-20 discussing the merits of the appeal and at 27, n.16 disclaiming any challenge to the "constitutionality of any governmental program directed to Native Hawaiians."

[3] *See, e.g., Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Petitioners, at 24, concluding that: "Congress's powers to treat American Indians tribes and their members, much less persons of Hawaiian ancestry, in a special fashion is very limited."

precedent defines the scope of the federal government's plenary power to determine the political status of and the scope of the trust responsibility owed the indigenous peoples now within the borders of the United States.

AFN opposes and responds to these needless efforts to expand the narrow issues to be decided in this appeal. As with the Native Hawaiians,[4] it was long contended that the Alaska Natives were not "Indians" subject to the exercise of federal plenary power under principles of federal Indian law. Federal plenary power proved crucial to preserve and protect the political status and land rights of the indigenous peoples of Alaska in 1966 when the Secretary of the Interior imposed a moratorium on the disposition of Alaska lands. *See* discussion of "land freeze" on pp. 29-31. As now partially exercised through the State of Hawaii, the same trust responsibility is also crucial to the preservation and protection of those fundamentally similar rights in Hawaii under state law. But these issues are not drawn into question in this appeal and the Court should stay its hand. The petition for writ of certiorari should be dismissed. In

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[4] *Amicus* AFN uses the term "Native Hawaiian" to refer to the descendants of the Native people of Hawaii who inhabited the Hawaiian Islands prior to 1778 and as the term is defined in the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993), reproduced at Pt.App. 103a-111a.

the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

ARGUMENT

I. FEDERAL PLENARY POWER OVER "INDIAN" AFFAIRS IS DERIVED FROM TWO SOURCES - FEDERAL COMMON LAW AND THE UNITED STATES CONSTITUTION.

A. Plenary power is derived in part from the historic, common law relationship of the United States to the indigenous peoples brought within its borders.

From its earliest decisions this Court has held that the status of the indigenous peoples under common law principles of federal Indian law is unique, and "unlike that of any other people in existence."[5] Their governments are "best denominated as domestic dependent nations."[6]

> From their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power. This has always been recognized by

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[5] *Cherokee Nation v. Georgia*, 30 U.S. 1 at 12 (1831).

[6] *Id.* at 13.

> the Executive and Congress, and by this Court wherever the question has arisen.[7]

These principles have been specifically applied to the Alaska Natives by the State of Alaska's highest court (relying on this Court's precedents) to confirm the tribal status of the Alaska Native Villages and their inherent jurisdiction to adjudicate child custody and other matters "internal" to the tribe "from a source of sovereignty independent of the land they occupy."[8]

This Court's 21st century decisions further explicate the common law basis of federal plenary power. For example, in *United States v. Lara,* this Court upheld the plenary power of Congress to reestablish inherent tribal jurisdiction to prosecute any Native American for violating tribal laws. Citing to

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[7] *United States v. Kagama*, 118 U.S. 375, 383, 384 (1886).

[8] *John v. Baker I*, 982 P.2d 738, 754 (Alaska 1999); *cert. denied*, 528 U.S. 1182 (2000); *see also United States v. Kagama*, 118 U.S. 375, 379-80 (1886) (enactment of Major Crimes Act); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903) (termination of treaty rights); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (Indian tribes are separate sovereigns for purposes of double jeopardy); *United States v. Antelope*, 430 U.S. 641, 645 (1977) (federal government addressing political entities, not members of particular race); *Morton v. Mancari*, 417 U.S. 535, 551 (1994) (Indian preference in employment); *United States v. Lara*, 541 U.S. 193, 207 (2004) (acknowledging the federal common law component of Indian rights, which common law federal courts develop as a necessary expedient when Congress has not spoken to a particular issue) (citations, quotations and emphasis omitted).

the military and foreign policy origins of federal Indian common law, the court concluded that:

> Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of pre-Constitutional powers necessarily inherent in any Federal Government, namely, powers of that this Court has described as 'necessary concomitants of nationality.'[9]

B. Plenary power is also derived from the Commerce and Treaty Clauses of the United States Constitution.

These provisions, together with the Supremacy Clause, comprise all that is necessary to afford Congress complete power to enact legislation related to Native Americans.[10] When Congress so acts in the field of Indian affairs it preempts contrary state legislation that might infringe upon the rights of reservation Indians to govern themselves.[11] Similarly, when Congress or the Executive branch recognizes a "distinctly Indian community" as an "Indian Tribe," it is a "political question" solely determined by the

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[9] *United States v. Lara*, 541 U.S. 193, 201 (2004) (citation omitted).

[10] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

[11] *Id.*; *accord Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

"political branches of government" and not reviewable by this Court.[12]

Plenary power is complete but not absolute. It cannot be exercised arbitrarily to bring a non-indigenous people within the scope of its Congressional power.[13] Nor can it be exercised to deprive a tribe or its members protection under the Fifth Amendment or other Constitutional rights.[14]

The Court emphasized the scope of Congress' plenary power in *United States v. Lara*,[15] as granting Congress the power to both restrict and relax restrictions on tribal sovereign authority. There, the Court noted the need for such comprehensive legislative power "would have seemed obvious" because the government's Indian policies were:

> Applicable to numerous tribes as diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically and if the needs of the Nation and those of the tribes changed over time.[16]

Federal policy has indeed fluctuated over time from the early treaty era through 1871, interspersed with removal, then followed by the General Allotment

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[12] *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[13] *Sandoval*, 231 U.S. *supra* at 46-47.

[14] *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

[15] 541 U.S. *supra* at 202.

[16] *Id.*

Act of 1887 and "assimilation" designed to breakup tribal lands. Following the loss of some 90 million acres under the General Allotment Act, Congress adopted the Indian Reorganization Act in 1934 to prevent further loss of land, which, in turn, was followed by the "termination" policy of the 1950's and 1960's. Indian policy now seeks greater tribal autonomy within the framework of a "government-to-government relationship" between the tribes and the federal government.[17]

II. THE FEDERAL GOVERNMENT DID NOT INITIALLY TREAT THE ALASKA NATIVES AS INDIGENOUS PEOPLE, BUT THAT POLICY WAS REVERSED BY THE EARLY TWENTIETH CENTURY.

Alaska is often a mystery for those who do not live there. Nowhere is this truer than in the application of federal Indian law to the Alaska Natives. Federal officials, often drawing from their experience of the "Indians" on reservations in the lower 48 states, sometimes assumed the same legal principles applicable there did not apply in Alaska. This was perhaps due to the perception that Alaska's history is somehow "different" and that, like the Native Hawaiians, the Alaska Natives were not initially considered to have the same relation to the federal government

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[17] *Id.*

as did the "Indians."[18] It was initially also a common assumption that the 1971 Alaska Native Claims Settlement Act (ANCSA)[19] untethered the Alaska Natives and the federal government from the normal legal principles applicable to their relationship. Neither perception is accurate.

The fundamental "difference" in Alaska's American history is that it began in 1867 with the Russian Treaty of Cession[20] rather than with the adoption of the United States Constitution in 1789. This meant that the Alaska Natives were not part of the first nearly 80-year history of federal Indian policy under the common law and Commerce Clause of the United States Constitution.[21] Article III of the 1867 Treaty of Cession divided all the inhabitants of Alaska into two broad categories: (1) the "uncivilized native tribes" and (2) all the other "inhabitants." The inhabitants "with the exception of the uncivilized native tribes" were to be admitted as citizens of the United States. As for the tribes, the last sentence of Article III provides that:

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[18] Cohen, Felix, *Handbook of Federal Indian Law* (U.S. Government Printing Office, 1942; reprinted University of New Mexico Press, 1986) at 404, quoting "Leasing of Lands within Reservations in Alaska," 49 L.D. 592, 594-595 (May 19, 1923), reprinted in Vol. II Opinions of the Solicitor, 1917-1974, 2075 at 2076 (U.S. Department of the Interior).

[19] 43 U.S.C. § 1601 et seq.

[20] Treaty Considering the Cession of Russian Possessions in North America, U.S.-Rus., 15 Stat. 539, TS No. 301 (1867).

[21] U.S. Const., Art. I, § 8, cl. 3.

> The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country.

As early as 1904 the federal courts held that this sentence applied the whole body of federal Indian law to the tribes of Alaska.[22] Nonetheless, until near the end of the 20th century, there was general judicial and policy confusion about the status of the Alaska Natives and their relationship to the federal government. It was often assumed that they did not have the same "trust" relationship with the United States and that, notwithstanding the 1867 Treaty, federal Indian law did not apply in Alaska.[23] Beginning with the enactments of ANCSA in 1971 and the Indian Self-Determination and Education Assistance Act in 1975 (ISDEA), and continuing with a host of statutes enacted to the end of the 20th century, it is now well established that:

> Alaska natives, including Indians, Eskimos and Aleuts, have the same legal status as members of Indian tribes singled out as

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[22] *In re Minook*, 2 Alaska Fed. 200, 220-21 (D. Alaska 1904) (so holding in determining a question of Alaska Native citizenship). *See generally* David S. Case and David A. Voluck, *Alaska Natives and American Laws* (2d ed., Univ. Alaska Press 2002) at 44-46 (discussing the application of the 1867 treaty to Alaska Natives).

[23] Case and Voluck, *supra* at 6-8; *accord* Cohen (1942), *supra* at 402 (discussing the treaty).

political entities in the commerce clause of the United States Constitution.[24]

The great confusion about the history of the relationship between the Alaska Natives and the federal government is that it is often characterized as being "unique." In truth it is no more unique than the history of any other Native American community within the United States. Like all Native American communities, that history begins with a treaty between the United States and a foreign power ceding the foreign power's authority over Native American territory to the United States. These cessions are understood to convey to the United States the exclusive right to acquire the aboriginal title of the Native Americans.[25] As in the contiguous United States, Native people living primarily in village communities historically denominated as "tribes" also populate Alaska.[26]

As noted earlier, what *was* different about Alaska was that the year was 1867, not 1789. By that time, following the end of the Civil War, America was on its march west and the Indians were in the way. In the

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[24] Cohen, Felix, *Handbook of Federal Indian Law* (2005 ed. LexisNexis Mathew Bender) at 336, n.1068. *See* authorities cited there.

[25] *Fletcher v. Peck*, 10 U.S. 87, 142-43 (1810) ("[T]he Indian title . . . to be respected by all courts, until it be legitimately extinguished," continues with the land when it is acquired by a new sovereign).

[26] Cohen (2005) at 336, n.1068.

latter half of the 19th century the United States adopted policies calculated to assimilate Native Americans, break up their tribal governments and divide their tribal lands. These policies found their expression in late 19th century Alaska judicial decisions and federal policies. Until 1884 Alaska was governed as a military district, but when the army attempted to use the federal Trade and Intercourse Act to stop the introduction of liquor, the courts held that Alaska was not "Indian country" subject to the Act.[27] The next year, Congress applied the liquor control sections of the Intercourse Act to Alaska, after which the courts upheld prosecutions for supplying liquor to the Indians.[28]

Similarly, the comptroller of the Treasury decided in 1873 that the Bureau of Indian Affairs (BIA) had no authority to implement programs or spend money in Alaska.[29] Much as was then the policy in the lower 48 states, these cases, statutes, and policies in Alaska were designed to assimilate the Natives into American society and generally avoided treating Alaska Natives as being subject to federal Indian law. At the end of the 19th century, the Department of the Interior Solicitor held that Alaska Natives did not have

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[27] *See United States v. Seveloff*, 1 Alaska Fed. 64 (D. Alaska 1872).

[28] *In re Carr*, 1 Alaska Fed. 75 (D. Alaska 1875).

[29] Case and Voluck, *supra* at 187, n.2.

the same relationship to the federal government as other Native Americans.[30]

In this same period of time, this Court reached a similar conclusion as to the Pueblo tribal communities of Southwest America.[31] Similarly, early decisions of the Alaska federal courts held that the Alaska Natives did not have a "tribal" form of government[32] and that their aboriginal claims to land had been extinguished by the 1867 Treaty or subsequent congressional legislation.[33] Section 8 of the 1884 Organic Act ambiguously protected the Alaska Natives' rights to land "actually in their use or occupation or now claimed by them" from encroachment by others, and Section 13 of the same statute required the Alaska Natives to be educated in schools "without regard to race."[34]

In spite of these policies, other forces were at work to protect Alaska Native lands under the federal "trust" responsibility and the doctrine of aboriginal title and to deal with the Alaska Native villages as tribal governments. Two cases, in 1904 and 1914, upheld the authority of the United States to prevent

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[30] *Alaska Legal Status of Natives*, 19 L.D. 323 (1894).

[31] *United States v. Joseph*, 94 U.S. 614 (1877).

[32] *In re Sah Quah*, 31 F. 327 (D. Alaska 1898).

[33] *Miller v. United States*, 159 F.2d 1005 (9th Cir. 1947).

[34] Compare §§ 8 and 13, Organic Act of May 17, 1884, 23 Stat. 24.

trespass to aboriginal lands in Alaska.[35] Additionally, although education was to be "without regard to race," in fact the federal education program in Alaska was implemented consistent with what would later be determined to be the unique political status of the Alaska Natives – comparable to that of the "Indians" in the contiguous states.

A noted missionary, Dr. Sheldon Jackson, was appointed General Agent for Education in Alaska to implement the non-racial educational policies of the 1884 Organic Act. In that capacity he established numerous schools in remote Native villages, which became the focus of health care, reindeer herding, and other programs administered by the Interior's Bureau of Education exclusively for Natives. In 1905 the Nelson Act specifically required the separation of white and Native children in the schools and increased the appropriations for Native services in Alaska.[36]

The Secretary of the Interior transferred responsibility for Alaska Native programs to the BIA in 1931.[37] Shortly thereafter the Interior Department

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[35] *United States v. Berrigan*, 2 Alaska Fed. 442 (D. Alaska 1904) and *United States v. Cadzow*, 5 Alaska Fed. 125 (D. Alaska 1914).

[36] "Nelson" Act of January 27, 1905, 33 Stat. 616, 619. *See also* Case and Voluck, *supra* at 8.

[37] Secretarial Order 494, March 14, 1931. *See also* Donald C. Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867-1959 – The Army to Statehood, 253-55* (1997).

Solicitor issued a new opinion, concluding after an exhaustive analysis of applicable cases, statutes and policies:

> From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos or other natives are natives or of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska referred to in the [1867 Treaty of Cession], are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States.[38]

Four years later Congress amended the Indian Reorganization Act to specifically include Alaska Natives.[39] Nonetheless, the confusion about the status of the Alaska Natives continued to the end of the 20th century.[40]

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[38] *Status of Alaska Natives*, 53 I. D. 593, I Ops. Sol. 303, 310 (1932).

[39] Act of May 1, 1936, § 1, 41 Stat. 1250 (25 U.S.C. § 473a).

[40] *See generally* Case and Voluck, *supra* at 11-12 (describing the implementation of the IRA and at 1-33 describing the evolution of federal Indian law and policy in Alaska).

III. ENACTMENT OF ANCSA IN 1971 AND THE ISDEA IN 1975 LED TO FORMAL RECOGNITION OF THE ALASKA NATIVES IN 1993 AND 1994.

The only mention of "tribes" in ANCSA is in the definition of "Native village," which includes "any tribe, band, clan, group, village, community, or association in Alaska" that qualified for ANCSA benefits.[41] The residents of each Native village were authorized to organize a "Village Corporation"[42] which is defined in ANCSA as:

> an Alaska Native Village Corporation organized under the law of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of [ANCSA].[43]

The Village Corporations were to receive the surface lands under ANCSA and the Regional Corporations were to receive the subsurface of those lands as well as, in some cases, additional surface and subsurface lands.[44] Although the "Native villages" clearly

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[41] Alaska Native Claims Settlement Act of December 18, 1971, § 3(c), 85 Stat. 689 (43 U.S.C. § 1602(c)).

[42] 43 U.S.C. § 1607(a).

[43] 43 U.S.C. § 1602(j).

[44] Regional Corporations were organized within each of the 12 ethnic regions of Alaska under 43 U.S.C. § 1606 and a "thirteenth" Regional Corporation for Alaska Natives living outside Alaska.

included "tribes," the corporations were not initially considered to be tribes. That soon changed.

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act. The ISDEA expressed a firm congressional commitment to:

> the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful self-determination policy which will permit an orderly transition from the Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.[45]

The ISDEA required the contracting of federal programs to an "Indian tribe" or the tribe's designated "tribal organization." The definition of these terms was crucial. "Indian tribe" under the ISDEA means:

> Any Indian tribe, band, nation, or other organized group or community including any Alaska Native *village or regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services

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[45] Act of January 4, 1975, § 3(b), 88 Stat. 2203 (25 U.S.C. § 450a(b)).

> provided by the United States to Indians because of the their status as Indians. (Emphasis added.)[46]

A "tribal organization" is defined in important part as "any legally established organization of Indians which is controlled, sanctioned, or charted by [the governing body of an Indian tribe]."[47]

Thus, four years following the enactment of ANCSA, Congress identified three separate Alaska Native institutions as "tribes." At that time, and up to the present, most Alaskan Native villages are also organized as consortia of regional, nonprofit corporations, each of which were ideally suited to act as a "tribal organization" for purposes of ISDEA contracting.[48] This resulted in the rapid contracting of BIA and Indian Health Service services to those organizations, as well as in many cases, to individual villages.[49] Moreover, the inclusion of the Village and Regional Corporations as "tribes" enabled the corporations to obtain contracts under the ISDEA when Native villages were not available for contracting.[50]

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[46] 25 U.S.C. § 450b(e).

[47] *Id.* at 25 U.S.C. § 450b(*l*).

[48] Twelve of these tribal organizations are the nonprofit consortia that sit on AFN's Board.

[49] *See* Case and Voluck at 221-24 describing the effect of the ISDEA in Alaska.

[50] *Cook Inlet Native Assn. v. Bowen*, 810 F.2d 1471-76 (9th Cir. 1987) (ANCSA Regional Corporation held to be a tribe for

(Continued on following page)

Beyond the congressional treatment of the Alaska Native corporations as tribes for certain purposes, it is also now well established in the general sense that the Alaska Native villages are federally recognized tribal governments. Owing perhaps to ANCSA's omission of tribes in the settlement, it took more than twenty years of litigation to confirm their status. At the end of the first Bush administration, Thomas L. Sansonetti, the Solicitor for the Department of Interior, issued a comprehensive 133-page opinion examining the historical status of the Alaska Natives and their continued entitlement to federal services and programs. Although the opinion stopped short of deciding that all the Alaska villages were federally recognized tribes, it noted in conclusion that:

> In our view, Congress and the Executive Branch have been clear and consistent in the inclusion of Alaska Natives as eligible for benefits provided under a number of statutes passed to benefit Indian tribes and their members. Thus we have stated that it would be improper to conclude that no Native village in Alaska could qualify as a federally recognized tribe.[51]

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purposes of ISDEA contracting for health and other federal services).

[51] *Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members* (M-36975, January 11, 1993).

Nine months later, and consistent with the Sansonetti opinion, the new Clinton administration published a comprehensive "Notice" in the Federal Register listing more than 200 of the Alaska Native villages and two regional tribes as federally recognized Indian tribes. The Notice states specifically that:

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.[52]

The very next year, Congress passed the federally Recognized Indian Tribe List Act that required the annual publication of a list of all federally recognized Indian tribes.[53] In 1998, after many years of litigation, this Court denied territorial jurisdiction to Alaska Native tribes to impose a tax on non-Natives on ANCSA land now held by the tribe.[54] In reaching its decision, the Court noted that the effect of ANCSA was to leave the Alaska Native villages as "sovereigns, without territorial reach."[55] The next year the

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[52] 58 Fed. Reg. 54365, 54366 (October 21, 1993).

[53] *See* 25 U.S.C. § 479a note, and 479a-1. The Alaska Native Native Tribes have included in every subsequent publication of the "List."

[54] *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

[55] *Id.* at 526.

Alaska Supreme Court concluded, in a groundbreaking decision, that even without territory, Alaska Native villages as federally recognized tribal governments, retained inherent common law jurisdiction over their members even outside of Indian country, sufficient to determine child custody and probably other "internal" matters significant to the exercise of inherent tribal sovereignty.[56]

IV. THE FEDERAL GOVERNMENT FACILITATED THE SETTLEMENT OF THE ALASKA NATIVE LAND CLAIMS BY PROHIBITING STATE LAND DISTRIBUTIONS AS AN EXERCISE OF PLENARY POWER AND THE TRUST RESPONSIBILITY.

A. The federal trust responsibility is founded on the common law decisions of the United States Supreme Court that acknowledge the unequal relationship arising out of the federal government's subjugation of the indigenous people within the borders of the United States.

The federal trust responsibility is founded on the inherently unequal relationship between the Native Americans and the federal government – an inequality largely of the government's own making.[57] The

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[56] *John v. Baker I*, 982 P.2d 738 (Alaska 1999).

[57] *E.g.*, *United States v. Kagama*, 118 U.S. 375, 384 (1886).

nature of that relationship was defined in the early years of the republic by congressional enactments and the common law decisions of the United States Supreme Court – the so-called Marshall Trilogy. The Trade and Intercourse Act of 1790 imposed a statutory restraint on the alienation on all tribal lands, preventing their disposition by the tribes except by a federal treaty.[58] The statute ensured a federal monopoly over the disposition of Indian lands, but it was the Supreme Court that defined the common law nature of Indian title.

In *Johnson v. M'Intosh*, John Marshall employed the "rule of discovery" to find that the United States held a superior title to the lands (variously characterized as "fee," "absolute title" or "absolute ultimate title").[59] The Indians, on the other hand, were considered to have an exclusive right of use and occupancy (which later came to be described as "aboriginal title" or "Indian title") that can only be defeated by the exercise of congressional authority. Because the United States gained the preemptive right to purchase the title, the result was that the Indian title was significantly diminished at common law in a way that paralleled the Trade and Intercourse Act's restraint on alienation.[60]

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[58] Act of July 22, 1790, 1 Stat. 137 (25 U.S.C. § 177).

[59] *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).

[60] *See generally* Cohen (2005), *supra* section 5.04[4][a], describing the development of the trust responsibility.

In the Cherokee cases (*Cherokee Nation v. Georgia* and *Worcester v. Georgia*), Marshall extended the analysis of the federal-tribal relationship to describe the political status of the Indian tribes as "domestic dependant nations" whose relationship to the federal government was something like that of a "ward to his guardian."[61] As a result of the Marshall decisions, and as a matter of federal common law, the Indians lost control of the disposition of their lands, and their governments were deemed placed under the protection of the federal government, subject to further limitations of their powers by Congress.[62] The weakened position thus thrust upon the Native Americans carried with it a common law "trust" responsibility for the federal government to protect aboriginal title from encroachment.[63] Early Alaska cases suggested for various reasons that the doctrine did not apply to Alaska, a conclusion this Court finally rejected in 1955.[64]

Supreme Court decisions in the late 19th to early 20th centuries expanded upon the Marshall Trilogy,

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[61] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[62] Cohen (2005), *supra* at 420. *See also United States v. Lara*, 541 U.S. *supra* at 205 (inherent tribal power subject to divestiture by Congress).

[63] *Johnson v. M'Intosh*, 21 U.S. *supra* at 588.

[64] *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 283, n.17 (1955) (holding that Native land claims in Alaska are on the same footing as in the lower 48 states and congressional extinguishment of aboriginal title is not compensable under the Fifth Amendment).

to evolve a virtually unchallengeable interpretation of the scope of congressional authority to legislate in the field of Indian affairs.[65] Similarly:

> [I]n respect distinctly Indian communities the question is whether, to what extent to and for what time they shall be recognized and dealt with as dependant tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[66]

The trust responsibility, as exercised by Congress and delegated to the Executive branch, is almost unfettered. As explained by this Court in *United States v. Lara*,[67] Congress can enact laws both restricting and relaxing restrictions on the sovereignty and autonomy of Native groups. However, once Congress delegates the power to manage tribal assets to the Executive branch and prescribes the standards

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[65] *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (tribal status determined exclusively by the political branches of government) and *United States v. Kagama*, 118 U.S. 375 *supra* at 384 (although not within the scope of the Commerce Clause, Congress held to have the common law power to regulate and prescribe penalties for crimes by Indians in Indian country because from the federal relationship to the tribes "there arises the duty of protection, and with it the power").

[66] *United States v. Sandoval*, 231 U.S. *supra* at 46 (1913).

[67] 541 U.S. *supra* at 202.

for doing so, the Executive branch can be held to principles applicable to a private trustee.[68]

B. Both Alaska and Hawaii were admitted to the United States in 1959. Alaska disclaimed all interest in Alaska Native lands, reserving to Congress the exclusive power to resolve Native land claims in Section 4 of the Alaska Statehood Act and Article XII, Section 12 of the Alaska Constitution.

1. State Lands

Alaska was admitted as a state on January 3, 1959. Section 6 of the Alaska Statehood Act initially allowed the new state 25 years to select approximately 103 million acres from "vacant, unappropriated, and unreserved" federal lands.[69] As was typical of most western states, a provision in the Alaska

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[68] Compare *United States v. Mitchell I*, 445 U.S. 535 (1980) (remanded to determine if federal government had defined statutory responsibilities in the management of allotment timber) with *United States v. Mitchell II*, 463 U.S. 206 (1983) (upholding a statutory responsibility to manage Indian timber). *See also Seminole Nation v. United States*, 316 U.S. 286, 297, n.12 (1942) (holding the United States to "the most exacting judiciary standards" when it erroneously paid money to the agents of the Indian tribe knowing them to be dishonest).

[69] Act of July 7, 1958, § 6(a) and (b), 72 Stat. 339. The Act was amended in 1980 to allow the state 35 years to make the selections.

Statehood Act and an identical provision in the Alaska Constitution also disclaimed:

> all right or title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives) [and retained these lands] 'under the absolute jurisdiction and control of the United States until disposed of under its authority.'[70]

Six months later, in a long pending case, the United States Court of Claims affirmed the aboriginal title of the Tlingit and Haida Indians to virtually all of southeast Alaska.[71] This decision set the stage for the settlement of the broader Alaska Native claims to aboriginal title throughout the new state and implicitly rejected the notion that the Alaska Natives were "unique" and not entitled to such claims.

In the ensuing years, as the state began to select its lands under the Statehood Act, the Alaska Natives became aware that the state's land selections conflicted with their traditional use and occupancy, i.e., aboriginal title. The Association on American Indian Affairs (AAIA) convened a 1961 conference on Native Rights in Point Barrow, Alaska. The conference

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[70] *Id.*, § 4, 72 Stat. 339. *See also* Art. XII, § 12 of the Alaska Constitution (containing parallel language).

[71] *Tlingit and Haida v. United States*, 147 Ct. Cls. 315, 177 F.Supp. 452 (1959).

issued a set of recommendations that described the problem and a way to solve it:

> The Alaska Statehood Act . . . says that the state may take over 100,000,000 acres from the public domain in 25 years. . . . If Congress does not define our [Native] rights soon, the 25 years will be up and our [rights] will be gone. Congress should act now to settle our Alaska Native land claims. . . . The interior department [sic] should immediately withdraw from the public domain in Alaska tracts of land around all Native villages, pending the establishment of reservations or other settlement of Alaska Native land claims.[72]

A series of events galvanized the Native land claims movement in the early-to-mid 1960s. In 1961 the Atomic Energy Commission proposed "Project Chariot" to create a harbor on the North Slope by detonating an underground nuclear device near the Village of Point Hope.[73] Five years later the Bureau of Land Management proposed a massive oil lease near the same village.[74] In 1963 several villages in Interior Alaska filed claims to millions of acres of land amid the threat of a proposed giant dam to be constructed

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[72] "Barrow Conference Statement and Recommendations," quoted from: Donald C. Mitchell, *Take My Land Take My Life* (University of Alaska Press, 2001) at 84.

[73] Robert D. Arnold, *Alaska Native Land Claims* (2d ed. Alaska Native Foundation, Anchorage 1978) at 94-95.

[74] Mitchell, *supra* at 124-28.

near the village of Rampart on the Yukon River that would have flooded many villages and vast areas used by the Athabascan Indians for hunting.[75]

Nascent Native leaders like Charlie Edwardsen, Jr. on the North Slope, Willie Hensley in the Northwest Arctic and Al Ketzler in the Interior of Alaska alerted villages in these regions to the impending loss of Native lands that could result from these proposals and the state's land selections under the Statehood Act.[76] The Native villages filed claims with the Interior challenging the state selections. Seventy-year-old Andrew Issac, then Chief of the Village of Tanacross, told the Senate Interior and Inuslar Affairs Committee at a 1968 hearing in Anchorage:

> We made our claim in 1963 because the state came in and selected our land – everything, even our village and graveyard. This is not fair. We own our land – the white man does not.[77]

On October 18, 1966 (the 99th anniversary of the 1867 Treaty of Cession) Emil Notti, the 34-year-old president of the Anchorage based Cook Inlet Native Association, convened a statewide meeting to organize the Alaska Federation of Natives to pursue the Native land claims. He was elected AFN's first

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[75] Arnold, *supra* at 102-03.

[76] Mitchell, *supra* at 129-32 (Edwardsen); 118-22 (Hensley); 88-93 (Ketzler).

[77] Quoted in Arnold, *supra* at 122-23.

president.[78] AFN's land claims committee, chaired by Willie Hensley, recommended a "land freeze" on all federal lands until Congress enacted legislation to settle the Native claims.[79]

2. "Land Freeze"

Before the end of the year, then Secretary of the Interior Stewart Udall, adopted AFN's recommendation. Newly elected Alaska Governor, Walter Hickel, wrote Udall a letter complaining that his action denied the state the right to its land selections under the Statehood Act. To which Udall replied:

> In the face of Federal guarantee that the Alaska Natives shall not be disturbed in the use and occupation of lands, I could not in good conscience allow title to pass into others' hands. . . .[80]

Following Udall's action, Native villages filed additional protests to state selections until by 1967 the protests covered about 380 million acres, which was more than the entire land area of the state.[81]

The state challenged the Secretary's action in the Alaska Federal District Court, which ruled against

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[78] *Id.* at 112-13. Emil Notti now serves as Alaska's Commissioner of Economic Development.

[79] *Id.* at 114.

[80] *Id.* at 118, quoting Udall letter.

[81] *Id.* at 119. *See also Edwardsen v. Morton*, 369 F.Supp. 1359, 1364 (D.C. Alaska 1973) (describing the land freeze).

the Secretary on summary judgment. The Ninth Circuit Court of Appeals reversed, holding that the Native claim to exclusive use and occupancy precluded summary judgment and was sufficient to prevent state land selections until the claims were resolved.[82] Richard Nixon was elected President while the case was pending, and he appointed Walter Hickel to succeed Udall as Secretary of the Interior. Three days before leaving office, Secretary Udall signed Public Land Order 4582, which expanded the moratorium to cover any disposition of some 262 million acres of federal lands, including state selections, and made it permanent pending settlement of the claims.[83] In order to secure confirmation as Secretary of the Interior, Walter Hickel had to agree that he would not revoke PLO 4582.[84]

Two years later, Congress, exercising its plenary power, enacted ANCSA, extinguishing aboriginal title throughout Alaska and confirming what would amount to 45 million acres of surface and subsurface estate to 12 Regional and more than 200 Village Corporations. Of the land freeze, Udall said:

> Frankly, I do not believe we would have made any significant progress on the Native claims issue if we had not held everyone's

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[82] *Alaska v. Udall*, 420 F.2d 938, 940 (9th Cir. 1969); *cert. denied, sub nom Alaska v. Hickel*, 397 U.S. 1076 (1970).

[83] Mitchell, *supra* at 189 and Arnold, *supra* at 125.

[84] Arnold, *supra* at 125-26.

> feet to the fire (or perhaps I should say to the ice) without the freeze.[85]

Udall's land freeze was critical to bringing the state and industry to the table, and directly resulted in the enactment of ANCSA.

It is now beyond doubt that Alaska Native Villages, as well as ANCSA Regional and Village Corporations, are federally recognized "tribes." The "Native Villages" defined in ANCSA, the ISDEA and other statutes listed under the requirements of the federally Recognized Tribe List Act are tribal governments with political jurisdiction at least over their members. Alaska Native regional and village corporations, as defined in or established under ANCSA, are also tribes for purposes of certain Native American programs and services. As the United States Supreme Court decided nearly a century ago in the case of "distinctly Indian communities . . . whether to what extent and for what time they shall be recognized . . . is to be determined by Congress."[86]

V. CONGRESS HAS EXERCISED ITS PLENARY POWER TO RECOGNIZE NATIVE HAWAIIANS IN THE SAME CAPACITY AS OTHER INDIGENOUS PEOPLES OF THE UNITED STATES.

The federal government acknowledges that it has a "special responsibility for the welfare of the Native

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[85] *Id.* at 124.

[86] *United States v. Sandoval*, 23 U.S. *supra* at 46.

peoples of the United States, including Native Hawaiians."[87] The United States' policy towards indigenous inhabitants of Hawaii is unique based on Hawaii's distinct history and geographical location. Similar factors, as with the American Indians, Alaskan Natives, and Pueblo Indians, bring them within the federal government's traditional trust responsibility owed to indigenous inhabitants. All indigenous tribes, groups, clans, pueblos, bands and villages have unique histories, cultures and historic relationships with the federal government. As this Court has repeatedly held, Congress' authority to extend the special relationship to indigenous peoples within the borders of the United States operates "whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state."[88]

The history of the United States' interaction with the indigenous inhabitants occupying the lands now considered the "United States" and brought within its borders is one of subjugation.[89] The continental

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[87] Brief for *Amicus Curiae* the United States at 1, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

[88] *United States v. Sandoval*, 231 U.S. *supra* at 46 (1913) (Pueblo Indian lands subject to Congress' exercise of guardianship over Indians); *see also United States v. Kagama*, 118 U.S. 375, 384 ("the theater of its exercise [Congress' plenary power of Indians] is within the geographical limits of the U.S.").

[89] *See Rice v. Cayetano*, 528 U.S. 495, 534 (2000) (Stevens, J., dissenting): "The descendants of native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the

(Continued on following page)

United States, Alaska and Hawaii all share this history. The unequal relationship and often disastrous effect of the United States' expansion created the guardian-ward relationship and the concomitant trust responsibility first recognized in *Cherokee Nation v. Georgia, supra.*

Similar to Alaska Natives, Native Hawaiians were not initially treated as indigenous people. But the federal government soon acknowledged their condition, and realizing the need for rehabilitation, included them in the same general regard as Native Americans and Alaska Natives.[90] In 1921, when the United States realized that Native Hawaiians were struggling for continued existence, it extended its trust responsibility to Native Hawaiians by passing the Hawaiian Homes Commission Act (HHCA). The Act set aside approximately 200,000 acres of ceded public lands for the benefit of Native Hawaiians.[91]

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hands of colonial forces, but also a purposefully created and specialized 'guardian-ward' relationship with the Government of the United States."

[90] H.R. Rep. No. 839, 66th Cong., 2d Sess. at 4 (1920). Recognizing the dire living conditions of Native Hawaiians and stating that Native Hawaiians are "our wards."

[91] Act of July 9, 1921, ch. 42, 42 Stat. 108. The Hawaiian Homes Commission Act defines Native Hawaiians as those of "not less than one-half part of the blood of the races inhabiting the Hawaiian Islands prior to 1778." *Id.* at § 201(7). However, *see* n.98 (Congress has consistently used broader classification without regard to blood quantum).

The HHCA made clear that the federal government and Native Hawaiians had a "special relationship" by promoting their self-determination and establishing a permanent land base for the benefit of Native Hawaiians.[92] Indeed, the Congressional hearings that preceded the enactment of the HHCA noted the similarity between the federal government's relationship with Native Hawaiians and its existing relationship with American Indians.[93]

The trust responsibility enumerated in the HHCA was delegated to the State of Hawaii upon admission to the Union[94] and a portion subsequently transferred to the Office of Hawaiian Affairs, which was established by the people of Hawaii through constitutional amendment, in part to ensure that the state's trust responsibility to Native Hawaiians is

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[92] *See also Keaukaha-Panaewa Community Ass'n, v. Hawaiian Homes Commission ("Keaukaha II")*, 739 F.2d 1467, 1472 (9th Cir. 1984) (Hawaiian trust obligation is rooted in federal law).

[93] *See* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 105 (1998); citing *Hearings Before House Comm. on Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-30 (1920).

[94] *See* Hawaii Admission Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, § 5; *see also Ahuna v. Dep't of Hawaiian Home Lands*, 640 P.2d 1161 (Haw. 1982) (defining scope of Hawaii's trust responsibility to Native Hawaiians by comparing the federal government's trust responsibility to Native Americans).

fulfilled.[95] As this Court has noted, "the federal power to pass laws fulfilling the federal trust relationship with the Indians may be delegated to the states."[96] In defining the scope of this trust responsibility and special relationship, the Hawaii Supreme Court realized: "Essentially, we are dealing with relationships between government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."[97]

After delegating a portion of the trust responsibility first established in the HHCA to the State of Hawaii, Congress has nonetheless repeatedly reaffirmed the special relationship with Native Hawaiians.[98] It has made clear that Native Hawaiians are owed a special duty of care by including them in the programs and laws benefitting indigenous people

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[95] Haw. Const., Art. XII, § 5.

[96] *Rice v. Cayetano*, 528 U.S. 495, 536-37 (2000) (Stevens, J., dissenting), citing *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 500-01 (1979).

[97] *Ahuna*, 640 P.2d *supra* at 1169.

[98] In doing so, Congress has consistently included the broader class of Native Hawaiians without regard to blood quantum in such legislation. *See, e.g.*, the 1994 Native Hawaiian Education Act establishing programs and funding for Native Hawaiian educational initiatives. Pub. L. No. 103-382, 108 Stat. 3794 (1994). The Native Hawaiian Education Act was re-enacted as part of the No Child Left Behind Act of 2001, as part B of title VII of Pub. L. No. 107-110 (2002), and is currently codified at 20 U.S.C. § 7512 et seq.

defined in the broader class as "Native American."[99] In one of many examples, Congress expressly found:

> The authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.[100]

When Congress passed the earlier 1988 version of the Native Hawaiian Health Care Act (quoted above), Congress explicitly noted the trust relationship and analogized it to that with Alaska Natives.[101] The Senate Report explained:

> While most commentators agree that a trust relationship exists, there is little agreement as to the exact nature of the obligations implicit in the relationship. It is probable that until Native Hawaiian issues are addressed on a comprehensive basis, such as they have been to some extent for many Indians and Alaska Natives, the extent of the trust relationship for Native Hawaiians will remain unsettled. What is clear, however, is that Congress does possess the authority, pursuant to the Federal-Native Hawaiian relationship to

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[99] *See Rice v. Cayetano*, 528 U.S. 495, 533 (2000) (Stevens, J., dissenting).

[100] 42 U.S.C. § 11701(17).

[101] 100th Cong., 2d Sess., Pub. L. No. 100-579, S.Rep. No. 100-580 at 26, *Analysis of Legal Relationship Between the Federal Government and Native Hawaiians.*

> enact legislation that is rationally related to the purposes of the trust relationship – to legislate for the benefit of Native Hawaiians.[102]

In fact, over 160 Congressional laws expressly include Native Hawaiians in the class of Native Americans receiving special treatment.[103]

CONCLUSION

The proper fulfillment of Hawaii's trust responsibility lies in the existing moratorium issued to protect Native Hawaiians' unrelinquished and unresolved claims to ceded lands. Similar to the "land freeze" in Alaska (*supra* at pp. 29-31), a moratorium is necessary to protect unsettled Native Hawaiian land claims and unresolved Native Hawaiian interests in the reconciliation process. As the Hawaii Supreme Court noted, the moratorium "serves as the *foundation* (or starting point) for reconciliation, including the future settlement of the plaintiffs' [Native Hawaiians'] unrelinquished claims."[104] Much as Secretary Udall exercised the federal trust responsibility to preserve the Alaska Native claims, so has the Supreme Court of Hawaii enforced the similar trust

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[102] S.Rep. No. 100-580 at 26, *Analysis of Legal Relationship Between the Federal Government and Native Hawaiians*.

[103] Brief for *Amicus Curiae* Hawai'i Congressional Delegation at 30, Rice v. Cayetano, *supra*.

[104] *OHA v. HCDCH*, 117 P.3d 884, 902 (2008) (emphasis provided).

Congress has delegated to the State of Hawaii as a matter of state law. But these issues are not drawn into question in this appeal and the Court should stay its hand. The petition for writ of certiorari should be dismissed. In the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 07-1372

In The
Supreme Court of the United States

STATE OF HAWAII, ET AL.,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF HAWAII

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL COALITION FOR ASIAN PACIFIC AMERICAN COMMUNITY DEVELOPMENT, INC., ORGANIZATION OF CHINESE AMERICANS, INC., ASIAN LAW CAUCUS, ASIAN AMERICAN INSTITUTE, ASIAN AND PACIFIC ISLANDER AMERICAN HEALTH FORUM, AND ASIAN PACIFIC AMERICAN LEGAL CENTER IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Asian American Justice Center ("AAJC") is a 501(c)(3) nonprofit, nonpartisan organization. The AAJC was incorporated in 1991 and opened its Washington, D.C., office in 1993. The AAJC works to advance the human and civil rights of Asian Pacific Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, the AAJC focuses its work to promote civil engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level. A nationally recognized voice on behalf of Asian Pacific Americans, the AAJC has an interest in protecting the rights of the Native Hawaiians.[2]

Amici include some of the largest and oldest Asian Pacific American groups in this country.

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[1] The parties have consented to the filing of this brief. Blanket consents of the parties to the filing of *amicus curiae* briefs are on file with the Office of the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] This brief follows Respondents in using the term "Native Hawaiian" to mean any individual who can trace some ancestry to the Hawaiian Islands' pre-1778 inhabitants. *See* Res. Br. at 2 n.1.

These organizations are involved in challenging racial discrimination, safeguarding civil rights, and protecting the rights of the Native Hawaiians. The statements of interest for these additional *amici* are included in Appendix A.

SUMMARY OF ARGUMENT

Petitioners challenge whether the Hawaii Supreme Court properly issued a permanent injunction under state law to halt Petitioners' efforts to sell certain lands that Petitioners hold in trust for Native Hawaiians. Specifically, Petitioners argue that, in finding that Native Hawaiians hold competing claims to the trust lands, the Hawaii Supreme Court improperly relied on a Congressional enactment that recognized the United States government's role in the overthrow in 1893 of the Kingdom of Hawaii (the "Federal Resolution").[3]

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[3] The full citation for the Federal Resolution is: Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, And to Offer An Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Federal Resolution"). The State legislature of the State of Hawaii earlier had enacted a similar piece of legislation, the Concurrent Resolution Requesting the President And Congress of the United States to Issue A Formal Apology on Behalf of the United States to Native Hawaiians for the Overthrow of the Kingdom of Hawaii, H.R. Con. Res. 179, 17th Leg., Reg. Sess. (Haw. 1993) ("State Resolution").

Petitioners base this argument in part on the contention that the Federal Resolution has no legal consequence, but instead merely is a "symbolic" "statement of regret." Pet. Br. at 1, 18. This contention posits a false dichotomy – either the Federal Resolution is "a source of substantive rights and obligations" for Native Hawaiians, or the Federal Resolution is solely symbolic and therefore without legal effect. In fact, the Federal Resolution falls between these extremes.

Although the Federal Resolution does not resolve any claims, it contains detailed findings of fact. *See* Argument I, *infra*. These findings are more than mere symbolism. They are an important part of the political process of reconciliation that Hawaii has put into place to resolve the competing land claims resulting from the overthrow of the Native Hawaiian government in 1893. *Id.* As a matter of state law, the Hawaii Supreme Court appropriately could rely on these findings to determine whether the state law requirements for injunctive relief had been met. *See* Argument II, *infra*. Indeed, because resolutions of the sort at issue here are so rare, these findings are entitled to particular deference. *See* Argument III, *infra*.

ARGUMENT

I. THE FEDERAL AND STATE RESOLUTIONS CONTAIN VIRTUALLY IDENTICAL, DETAILED LEGISLATIVE FINDINGS OF FACT DESCRIBING THE ROLE OF THE UNITED STATES IN OVERTHROWING THE KINGDOM OF HAWAII

Under Hawaii law, a court properly may issue a permanent injunction if the court finds, among other things, that the plaintiff "has prevailed on the merits." *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw.*, 177 P.3d 884, 922 (Haw. 2008). Here, the Hawaii Supreme Court found that Respondents, including the Office of Hawaiian Affairs ("OHA"), prevailed on the merits of their state-law breach-of-fiduciary-duty claim, based on the factual findings in the Federal Resolution. The factual recitations on which the Hawaii Supreme Court relied on themselves tracked the language of the State Resolution, which is identical to the Federal Resolution in all material respects. *See* H.R. Con. Res. No. 179, 17th Leg., Reg. Sess. (Haw. 1993); Res. Br. at 8. In addition, the Hawaii Supreme Court relied on other state legislative findings in other state law enactments. As Respondents explain, "all of the relevant findings in the [Federal] Resolution were accompanied by parallel findings in state law: indeed, . . . the Hawaii Supreme Court arguably placed as much weight on the latter findings as it did on the former." Res. Br. at 33. These findings fall into four basic categories, which are discussed below.

First, using identical language, the State Resolution and the Federal Resolution (together, the "Resolutions") each describe in detail the overthrow and annexation of the Kingdom of Hawaii, stating, for example:

- "on the afternoon of January 17, 1893, [American representatives] deposed the Hawaiian Monarchy and proclaimed the establishment of a Provisional Government [later renamed the Republic of Hawaii];"

- "on July 7, 1898, . . . President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;"

- "the Newlands Resolution, ratified the cession [of land], annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;" and

- "on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States." Federal Resolution, Pub. L. No. 103-150, 107

Stat. 1510, 1510-13; Haw. State Resolution, H.R. Con. Res. 179.

Second, again using identical language, the Resolutions each acknowledge the United States' role in these events. For example, both Resolutions state that:

- "[i]n pursuance of the conspiracy . . . the United States . . . position[ed] [armed naval forces] near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;"

- "without the active support and intervention by the United States . . . , the insurrection against the Government of Queen Liliuokalani would have failed . . . ;"

- the Provisional Government took power "without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations [Hawaii and the United States] and of international law;"

- "the report of a Presidentially established investigation . . . into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States diplomatic and military

representatives had abused their authority and were responsible for the change in government;" and

- "the illegal acts of the conspirators . . . [constituted] an 'act of war committed with the participation of a diplomatic representative of the United States and without authority of Congress.'" Federal Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1510-13; State Resolution, Haw. H.R. Con. Res. 179.

Third, the State and Federal Resolutions each recognize, again using identical language, that the Native Hawaiians were deprived of their land without ceding title and that competing land claims resulted from the overthrow of the Kingdom of Hawaii. The State and Federal Resolutions each state:

- "[t]he Republic of Hawaii . . . ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government; . . . Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;" and

- "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." Federal Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1510-13; State Resolution, Haw. H.R. Con. Res. 179.

Finally, both the State and Federal Resolutions expressly recognize that they constitute an important step in the political reconciliation process that the State of Hawaii has put into place to resolve, among other things, the Native Hawaiians' competing land claims. For example:

- the Federal Resolution expresses the intent of Congress to "provide a proper foundation for reconciliation between the United States and the Native Hawaiian people . . . and urges the President of the United States to . . . support [the same]." Federal Resolution, Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1512-13.

- The Federal Resolution goes on to recognize that "Congress . . . expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii," including "the long-range economic and social changes in Hawaii [that] . . . have

> been devastating to the population and to the health and well-being of the Hawaiian people." *Id.*

- The State Resolution similarly "urges the President and Congress of the United States to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, and to support reconciliation efforts between the United States and the Native Hawaiian people." State Resolution, Haw. H.R. Con. Res. 179.

Based on these findings from the State and Federal Resolutions, the Hawaii Supreme Court found that

> native Hawaiians (1) "never directly relinquished their claims to . . . their national lands to the United States," and (2) "are determined to preserve, develop and transmit to future generations their ancestral territory . . . ." As such, we believe and, therefore, hold that the Apology Resolution and related state legislation . . . give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.

Office of Hawaiian Affairs, 177 P.3d at 905 (internal citation omitted).

Particularly in light of the virtually identical terms and structure of the State and Federal Resolutions, it is neither surprising nor improper for the Hawaii Supreme Court to have analyzed and relied on the factual findings in the Federal Resolution.

II. COURTS APPROPRIATELY MAY RELY ON CONGRESSIONAL FACT FINDING, PARTICULARLY IN THE CONTEXT OF A GOVERNMENTAL APOLOGY AND RECONCILIATION PROCESS

In describing the United States-supported overthrow and annexation of the Kingdom of Hawaii, the Federal Resolution provides detailed factual findings upon which courts properly may rely. These findings rest on a thorough review of primary source material regarding the history of the United States' annexation of Hawaii. For example, Congress provided a detailed report to accompany the Federal Resolution, Senate Report 103-126, that contains a myriad of primary source materials, which the Senate Report describes as including "presidential messages, conventions, and treaties . . . between the [United States and Hawaii]." This Report demonstrates that Congress based its factual findings on a substantial record. And, this Report shows that, in making these findings, Congress understood that it was giving voice to those who were hurt by the improper acts that the Federal Resolution recounts. *See, e.g.*, 139 Cong. Rec.

H9627-02, H9629 (1993) (Mr. Thomas speaking); *id.* at H9630 (Mr. Faleomavaega speaking); *id.* at H9631-H9632 (Mrs. Mink speaking).

This Court consistently has made clear that courts properly may rely on congressional findings of fact. For example, this Court has held that "[w]hen Congress makes findings on essentially factual issues . . . , those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). *See also Turner Broad. Sys. Inc. v. Fed. Commc'n Comm'n*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions." (citing *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 665-66 (1994) (plurality opinion) (quoting *Walters*, 473 U.S. at 330, n. 12)). *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 20-21 (2005) (relying on congressional findings of fact in the Controlled Substances Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (relying on congressional findings of fact in the Family and Medical Leave Act); *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 646 (1994) (relying on congressional findings of fact in the Cable Television Consumer Protection and Competition Act of 1992); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (relying on congressional findings of fact in the Indian Child Welfare Act).

Indeed, the U.S. Court of Appeals for the Ninth Circuit recently relied on the factual findings in the Federal Resolution. In *Doe v. Kamehameha Schools*, 470 F.3d 827, 845 (9th Cir. 2006), the Ninth Circuit considered a private school's admission policy that favored Native Hawaiians. In finding that the school's admission policy "does not unnecessarily trammel the rights of non-Native Hawaiians," the Ninth Circuit cited the Federal Resolution as establishing that the Native Hawaiians have historically suffered particularly difficult challenges "in the educational arena." *Id.* The Ninth Circuit also relied on the Federal Resolution as "Congressional recognition of the challenges faced by the Native Hawaiians." *Id.*

Legislative fact findings are particularly significant in the context of legislative reconciliation efforts. The very purpose of these efforts is to set forth the facts giving rise to the wrongs at issue, and to acknowledge responsibility for those wrongs. As one scholar recently noted, an "[a]pology may be morally important even if it plays little or no role in reparative justice." Janna Thompson, *Apology, Justice, and Respect: A Critical Defense of Political Apology*, *in The Age of Apology: Facing Up to the Past* 31, 33 (Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud & Niklaus Steiner eds., University of Pennsylvania Press 2008). To the victims of governmental wrongdoing, apologies often may be more important than monetary or material remuneration. *See* Erin Ann O'Hara, Douglas Yarn,

On Apology & Consilience, 77 Wash. L. Rev. 1121, 1125 (2002).[4]

Thus, legislative fact findings are important, even where, as here, the legislative act does not award reparations or create rights or obligations. These factual findings are a critical part of "[r]epairing the damaged relationship between racial groups[, which] requires that the victimizers accept responsibility for their acts or those of their predecessor governments and people, recognize and

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[4] One key reason is that the fact-finding aspect of legislative apology resolutions furthers the reconciliation process by giving voice to groups such as Native Hawaiians. The fact findings in legislative apologies are important for other reasons as well. For example, the fact-finding element of legislative apologies serves a particularly critical role in the reconciliation process because that element creates for the government and the affected individuals a common narrative from which further political efforts can grow. *See* Rhoda E. Howard-Hassmann, Mark Gibney, *Apologies and the West, in The Age of Apology: Facing Up to the Past* 1, 4-5. Consequently, governmental recognition of historical facts and governmental apology can be a critical element in ensuring the furtherance of an equal, just, and stable society. *See* Michael Freeman, *Historical Injustice and Liberal Political Theory, in The Age of Apology: Facing Up to the Past* 45, 58-59. In addition, the fact findings can be critical to showing a governmental commitment to restoring the relationship with the affected group and to ensuring that history will not repeat itself. *See* Roy L. Brooks, *The Age of Apology, in When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* 3, 4 (Roy L. Brooks ed., New York University Press 1999). This is particularly important in the Native Hawaiian community. *See* Sharon K. Hom, Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. Rev. 1747, 1759-60 (2000).

act upon the injustice done, and in some way ask forgiveness of the victims." Eric K. Yamamoto, *Race Apologies*, 1 J. Gender Race & Justice 47, 64 (1997). Indeed, Congress recognized this precise point in a resolution apologizing for the role of the United States in slavery, stating that "a genuine apology is an important and necessary first step in the process of racial reconciliation." *See* Slavery Resolution, H.R. Res. 194, 110th Cong. (2008), discussed *infra* at 18-19.[5]

In sum, one of the important goals of a legislative apology is to acknowledge and set forth the facts that establish the wrong for which the government apologizes. The fact findings are an end in themselves. Courts appropriately rely on those fact findings in determining the application of state law.

III. LEGISLATIVE APOLOGIES ARE RARE, AND THUS THE FACT FINDINGS THEY INCLUDE ARE PARTICULARLY SIGNIFICANT

Governmental attempts at reconciliation are not new, and apologies (including factual acknowledgements) long have held an important role in those efforts. As one scholar writes, "*[m]ea culpa*

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[5] The Hawaii Supreme Court also recognized the importance of apologies in the reconciliation process. *See* Brief *amici curiae* of Equal Justice Society and Japanese American Citizens League of Hawaii-Honolulu Chapter in Support of Respondents at 28 n.13.

is not a post-Enlightenment sentiment, of course. Forever etched in Western culture as the symbol of remorse is the image of Henry IV standing barefoot and repentant at the castle of Pope Gregory VII in 1077." Brooks, *supra* note 4, at 3.[6] *See also* Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 Va. J. Int'l L. 433, 440 n.14 ("[A]pologies, and demands for apology, have figured significantly in earlier [United States] history."). The United States long ago recognized the need for official apologies in the context of international relations. For instance, on July 19, 1928, the United States government apologized to Great Britain for violating the sovereignty of the Bahamas when the Coast Guard seized a ship suspected of smuggling liquor. Dodds, *supra* note 6.[7]

But beginning in the late 20th century, two important trends emerged that, together,

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[6] In 1077, Holy Roman Emperor Henry IV apologized to Pope Gregory VII by standing barefoot in the snow for three days. Graham G. Dodds, Political Apologies Chronological List, http://reserve.mg2.org/apologies.htm (last visited Jan. 26, 2009).

[7] Governments benefit from apologies for various reasons. Indeed, governments "would usually not apologize if they did not think that apologies served their national or governmental interests." Bilder, *supra*, at 463. Among other reasons, a government may apologize: (1) to bolster its domestic and/or international reputation; (2) to signal a change in position regarding the appropriateness or legality of certain conduct; or (3) as a way of defusing and resolving a contentious and potentially volatile dispute regarding an alleged harm. *Id.* at 464-67.

demonstrate why it is particularly appropriate to rely on factual findings in legislative apology resolutions. First, beginning after World War II, and with increasing frequency, governments around the world issued formal apologies for human rights violations, improper governmental actions, and race-based wrongs. Second, in very rare instances, the federal Congress and state legislatures undertook formal fact-finding and legislative action to enact formal apology resolutions, including the Resolutions. When taken in this context, the fact findings in the Federal Resolution can be understood to be a significant governmental action that courts may and should rely upon.

Beginning in the late 20th century, governmental apologies became increasingly common.[8] Many of these apologies stemmed from

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[8] For example, some of the United States' non-legislative apologies in the late 20th and early 21st centuries include the following: On December 31, 1989, the United States apologized to Nicaragua for American troops searching the Nicaraguan ambassador's residence in Panama City. On May 5, 1990, Ohio Governor Richard F. Celeste apologized for the 1970 Kent State shootings. On March 11, 1995, the thirtieth anniversary of the Selma-to-Montgomery civil rights march, former Alabama Governor George Wallace apologized to civil rights advocates for resisting desegregation. On May 16, 1997, President Clinton held a White House ceremony to apologize for the 48-year Tuskegee Syphilis Study by the United States Public Health Service that withheld medical treatment of the disease. On July 14, 2000, Thomas Foley, the United States Ambassador to Japan, and Lieutenant General Earl Hailston, the highest ranking American officer in Japan, apologized to Okinawa Governor Inamine Keiichi for crimes committed by United States military personnel in Japan. On November 28,

(Continued ...)

government action regarding a particular race or culture. *See* Bilder, *supra*, at 440 n.14; Eric K. Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America* 51 (New York University Press 1999); *see also* Alison Dundes Renteln, *Apologies: A Cross-Cultural Analysis, in The Age of Apology: Facing Up to the Past* 61, 61. The reasons for the growing apology trend are widely debated.[9] But whatever the reasons for it, governments in the late 20th century viewed as significant the process of the acknowledgement of and apology for historical wrongs.

(... Continued)
2002, President Bush apologized, via the United States ambassador in Seoul, for the deaths of two South Korean girls hit by a United States military vehicle in June. Dodds, *supra* note 6.

[9] According to one author, this trend resulted from changes in religious and secular thought, combined with the emergence of new social movements such as the civil rights movement. *See* Howard-Hassmann, *supra* note 4, at 2-3. Another author posits that a new emphasis on morality might have caused the increase in apologies. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices XVII* (W.W. Norton & Co. 2000). This author also opines that the increase resulted from the decolonization of the international world and the simultaneous trend towards equality in America. *Id.* at 159-60. Other scholars have suggested other potential causes of the increase. *See, e.g.*, Jean-Marc Coicaud, Jibecke Jönsson, *Elements of a Road Map for a Politics of Apology, in The Age of Apology: Facing Up to the Past* 77, 82 (shifts "from dictatorships, in which basic liberties had been regularly violated, to democratic governments" presented a host of "ethical, legal and political difficulties," and apologies became a tool to address the "abusive and criminal past").

In rare instances, the federal and state governments took special action, enacting detailed legislative apology resolutions. At the federal level, Congress has enacted only three such resolutions, apologizing for the internment of Japanese-Americans during World War II, for slavery, and for the overthrow of the sovereign Hawaiian Kingdom in 1893. And the issues of slavery and Hawaiian annexation are the only human rights issues to produce concurrent federal and state legislation.

The first legislative apology enacted by the United States Congress was the Civil Liberties Act of 1988. Pub. L. No. 100-383, 102 Stat. 904 (1988), which apologized to the United States citizens and permanent resident aliens of Japanese ancestry who were victims of the Japanese internment and relocation during World War II.[10] The Civil Liberties Act used the structure later used by Congress and the Hawaii State Legislature in the Resolutions: factual recitation, governmental acknowledgment of its role in the events and the consequences of its actions, and apology.

Since the Civil Liberties Act, Congress has issued only two legislative apologies: House Resolution 194, which apologizes "for the enslavement and racial segregation of African-Americans," and the Federal Resolution at issue

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[10] The Civil Liberties Act also addressed and apologized for wrongs perpetrated on the Aleutian people. For ease of explanation, this brief focuses only on the portions of the Act that address the wrongs perpetrated on Japanese-Americans.

here. Both of these resolutions had a similar structure and articulated a purpose similar to that stated in the Civil Liberties Act. As described *supra* at 3-8, the Federal Resolution, like the Civil Liberties Act, made factual findings about the events in question, acknowledged the government's role in those events, acknowledged the consequences of those events, and took important steps towards reconciliation.

Petitioners argue that, because Congress can alter the substantive rights of victimized groups when it chooses to do so, its decision not to do so here renders the Federal Resolution meaningless.[11] In fact, just the opposite is true. Although Congress can alter substantive rights if it chooses, Petitioners fail to recognize that these resolutions are meant to further the reconciliation process, and that substantive reparations are not the only way to accomplish this task. Indeed, as discussed *supra* at Argument II, resolutions have a significant impact regardless of whether they provide for reparations or create legal rights.

Therefore, when a legislature enacts, and the President signs, a resolution that does not create

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[11] Unlike H.R. 194 and the Resolutions at issue here, the Civil Liberties Act also established the framework for potential pardons of those convicted of violating the anti-Japanese legislation of the time, and awarded monetary reparations to some of the victims. Civil Liberties Act of 1988, Pub. L. No. 100-383 §§ 102, 105, 102 Stat. 903; Pet. Br. at 29.

legal rights or obligations, it is not choosing to enact a meaningless piece of legislation. Rather, it is choosing a different path towards reconciliation. Both options result in significant steps toward ultimate resolution, and neither choice results in a resolution devoid of meaning. Indeed, the one resolution that provides substantive remuneration has no more validity than the two that simply lay out the facts, apologize, and let the healing political process progress on its own.

This Court has wisely chosen not to second guess such legislative judgments. Rather, this Court has allowed state legislatures to experiment with solutions to various problems they confront, subject only to the requirement that the solutions do not violate the United States Constitution or federal law. As Justice Brandeis wrote long ago, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Oregon v. Ice*, --- S. Ct. ----, No. 07-901, 2009 WL 77896, at *7, (Jan. 14, 2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so.") (citing *Liebmann*, 285 U.S. at 311) (internal citation omitted).

Because legislative apologies are rare, legislative findings in the context of such apologies are especially significant, particularly where, as

here, they are present in both federal and state enactments. Thus, it was particularly appropriate for the Hawaii Supreme Court to rely on the factual findings in the Federal Resolution.

CONCLUSION

For the foregoing reasons, and for the reasons described in Respondents' brief, the petition for a writ of certiorari should be dismissed. In the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

January 29, 2009

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APPENDIX

APPENDIX

List of *Amici Curiae*

The National Coalition for Asian Pacific American Community Development, Inc. (National CAPACD)
CAPACD is the first national advocacy organization dedicated to addressing the housing, economic, and community development needs of Asian Americans, Native Hawaiians, and Pacific Islanders. Our mission is to be a powerful voice for the unique community development needs of Asian American, Native Hawaiian, and Pacific Islander communities and to strengthen the capacity of community-based organizations to create neighborhoods of hope and opportunity. National CAPACD has member organizations whose mission it is to serve Native Hawaiian communities.

Organization of Chinese Americans, Inc. (OCA)
OCA is a 501(c)(3) nonprofit, nonpartisan social justice organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. Founded in 1973 and headquartered in Washington, DC, OCA works with 10,000 members in 81 chapters and college affiliates to embrace the hopes and aspirations of Asian Americans, Pacific Islanders, and Native Hawaiians. With a chapter in Hawaii and Native Hawaiian members and allies throughout the United States, OCA has an interest in protecting the rights of the Native Hawaiians.

Asian Law Caucus
Founded in 1972, the Asian Law Caucus is a non-profit organization advancing the legal and civil rights of Asian American and Pacific Islander communities. It is the nation's oldest legal organization serving Asian Americans and is dedicated to the pursuit of equality and justice for all sectors of society.

Asian American Institute (AAI)
AAI is a pan-Asian, nonprofit organization, whose mission is to empower the Asian American & Pacific Islander community through advocacy, utilizing research, education, and coalition-building. AAI is committed to remedying past and present social inequalities by advocating for policies that promote social, economic, educational, and political equity of the Asian American community as a whole.

Asian and Pacific Islander American Health Forum (APIAHF)
APIAHF is a national organization dedicated to promoting policy, program, and research efforts to improve the health and well-being of Asian Americans, Native Hawaiians, and Pacific Islanders. Founded in 1986, the APIAHF's mission is to enable Asian Americans, Native Hawaiians, and Pacific Islanders to attain the highest possible level of health and well-being through advocacy on health issues of significance to those communities, community-based technical assistance and training, health and U.S. Census data analysis, and research. The APIAHF has a commitment to the Native Hawaiians and Pacific Islander community, who have a unique and rich history and political status;

APIAHF has an interest in matters surrounding the protection and upholding of Native Hawaiian rights. The APIAHF believes that the protection of these rights is critical to the preservation of the Native Hawaiian community and its health and well-being.

Asian Pacific American Legal Center (APALC)
Founded in 1983, the Asian Pacific American Legal Center of Southern California is the largest public interest law firm in the nation devoted to the Asian and Pacific Islander community. In advocating for social justice, APALC supports the full and equal rights of the diverse members of our community including those of Native Hawaiians.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 11 2008
OFFICE OF THE CLERK

114

(10)

No. 07-1372

In the
Supreme Court of the United States

HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Writ of Certiorari
to the Supreme Court of Hawaii

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QUESTION PRESENTED

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29% of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of state sovereignty. The Center is led by John Eastman, Dean of the Chapman University School of Law, and the Honorable Edwin Meese III serves as the honorary chair. The Board of Advisors for the Center includes a number of distinguished academics such as Hadley Arkes, Henry Jaffa, Douglas Kmiec, and John Yoo—just to name a few.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

of Engineers, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this Court is one of special importance to the plan of the Constitution. The decision to divide powers between the original states and the new federal government was a product of compromise meant to address fears that too much power would be concentrated in the new federal government. By refusing to permit power to be centralized in one branch or even one level of government, the Founders decided that preserving liberty was more important to the success of the nation than efficient exercise of power. Those limits on the concentration of power are tested in this case.

This case raises the question of whether Congress can impose limits on the sovereign powers of states—long after the states have been admitted into the union. As interpreted by the Hawaii Supreme Court, the resolution adopted by Congress achieved that limit on state power. The state court acted in what it saw as the best interest of the descendants of native Hawaiians who still protest a century-old injustice.

Congress may well have the power to resolve injustices from the distant past by opening up the federal treasury or issuing apologies. It does not, however, have the power to alter the frame of government set down in the Constitution. The federal government remains one of few and defined powers, and those powers do not include the authority to prohibit states from alienating state-owned property.

SUMMARY OF ARGUMENT

In the Act of Admission, Congress granted to the state of Hawaii lands to be used for a variety of public purposes including support of the public school system. With this grant, Congress continued a tradition that began with the Northwest ordinance of providing land to the new states to support public education and other purposes.

In addition to support of public education, the Hawaii Act of Admission specified that profits from the sale of these lands would be used to support native Hawaiians, home ownership, and public lands. The Hawaii Supreme Court, however, believes that a 1993 congressional resolution altered the terms of this grant. In its ruling below the Hawaii Supreme Court enjoined the state from selling any of the granted lands for any purpose until the state had achieved some unspecified reconciliation with descendents of native Hawaiians.

Amicus leaves to the parties to argue whether the Hawaii Supreme Court correctly interpreted the 1993 congressional apology resolution. Instead, this brief argues that if Congress intended to take the action ascribed to it by the Hawaii Supreme Court, that Congress exceeded its authority under the Constitution.

Hawaii was admitted to the union on an equal footing with other states. That means that the act of admission recognizes in the state the same sovereignty retained by the original 13 states after formation of the union. While Congress might have the power to take property upon the payment of just compensation, the Hawaii Supreme Court did not

interpret the apology resolution as an act of eminent domain. Instead, the state court believed that Congress altered the terms of the grant of lands to the state as originally outlined in Section 5 of the Act of Admission.

According to the state supreme court, lands that had passed to the sovereign state of Hawaii at its admission have now been burdened by new, federally imposed restrictions on alienation. Under the Equal Footing Doctrine, however, Congress does not retain the power to dictate new restrictions on the alienation of property that was granted to the state. As a full and equal member of the union, Hawaii must have the same rights to alienate granted property as enjoyed by every other state. For more than 200 years, this Court has consistently held that Congress has no power to "reserve or convey . . . lands that 'ha[ve] already been bestowed' upon a State." *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001).

ARGUMENT

I

THE ACT OF ADMISSION GRANTED THE LAND IN QUESTION TO THE STATE OF HAWAII

No party questions the proposition that the lands in question were granted to the State of Hawaii. Section 5 of the Act of Admission provides that in addition to succeeding to the title of lands held by the Territory of Hawaii, the state was granted "title to all the public lands and other public property . . . title to which is held by the United States immediately prior to its admission into the

Union." Hawaii Admission Act, Pub. L. 86-3, § 5(b), 73 Stat. 4 (1959). This grant encompassed nearly 1.2 million acres, and was in addition to a separate grant of 200,000 acres provided for in the Hawaiian Homes Commission Act. *Rice v. Cayetano*, 528 U.S. 495, 507 (2000).

This grant of land (including proceeds from the sale of the land by the state) was for the benefit of public schools, promotion of farm and home ownership, lands for public use, and "the betterment of the conditions of native Hawaiians." Pub. L. 86-3, § 5(f). In this, the grant of land to the new state followed a pattern set in the Land Ordinance of 1785 of setting aside land for public schools. *Papasan v. Allain*, 478 U.S. 265, 268-71 (1986) (for extended treatment of the history of the school land grants *see Andrus v. Utah*, 446 U.S. 500, 522-26 (1980) (Powell, J., dissenting).

In the Act of Admission, Congress emphasized the terms of the grant. Although the Act provided for a five year period in which the federal government could reclaim some of the granted lands (Pub. L. 86-3, § 5(d)), the Act also expressly provided that "[a]ll laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii . . . shall cease to be effective upon the admission of the State of Hawaii into the Union," Pub. L. 86-3, § 5(h).

Hawaii was the last state admitted to the union, achieving statehood in 1959. Nonetheless, once admitted, the State of Hawaii was possessed of the same sovereignty over state lands (including lands granted to the state in the Act of Admission) as the

original 13 states exercised over their lands after ratification of the United State Constitution. Hawaii was admitted to the union "on an equal footing with the other States in all respects whatever." Pub. L. 86-3, § 1.

II

ONCE LAND IS GRANTED, CONGRESS MAY NOT IMPOSE NEW RESTRICTIONS ON ALIENATION

Although there may have been some debate at the founding whether new states could be admitted to the union has "junior partners" to the original 13 states, the rule is now firmly established that new states enter the Union on an "equal footing." This Court in *Coyle v. Smith* ruled that the equal footing doctrine flowed not simply from the acts of admission, but was inherent in the definition of "a state." Examining the constitutional authority of Congress to admit new states, this Court noted that the power "is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit states.'" *Coyle v. Smith*, 221 U.S. 559, 566 (1911). The Court ruled that a state was defined in terms of its political power and sovereignty rather than geographic area.

In *Coyle*, the Court considered a provision of the Oklahoma Admission Act that prohibited the state from moving the state capitol for a specified number of years after admission. The act also prohibited the expenditure of state funds during that period to prepare for a move of the capitol. *Id.* at 564-65.

Distinguishing these provisions from the specification in the Act of the location of the initial state capitol, this Court noted that there is a difference between conditions that are fulfilled at admission and those that operate in the future. *Id.* at 568. With regard to the latter, conditions are permissible only to the extent that they are supported by an affirmative grant of power to the federal government.

> The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Id. at 573.

Each new state comes to the Union with the same "rights of dominion and sovereignty which belonged to the original states.". *Id.* at 577 (quoting *Bolln v. Nebraska*, 176 U.S. 83, 88 (1900)). The Federalist design of the Union required the original states to cede a portion of their sovereignty to the new national government. As expressed in the Tenth Amendment, however, this new national government was one of few and defined powers. *See* The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961); *United States v. Lopez*, 514 U.S. 549, 552

(1995); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The states retained sovereignty on other issues. States were not "relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999). Quoting from The Federalist No. 39 (James Madison), this Court in *Alden* noted that the States "retain 'a residuary and inviolable sovereignty.'" *Id.* Under the Equal Footing Doctrine, this "residuary and inviolable sovereignty" is held by new states to the same extent as the original 13. *Coyle*, 221 U.S. at 573.

As a consequence of this retained sovereignty, "[t]he Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution." *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984). In making this statement in *Summa*, this Court relied on its earlier decision in *Pollard v. Hagan*, 44 U.S. 212 (1845). In that case, there was a dispute over submerged lands in Alabama. The issue was whether the United States controlled the lands and thus had power to sell them to private parties. This Court ruled that Alabama had the sole power to decide the disposition of the lands in question. "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty . . . . Nothing remained to the United States, according to the terms of the agreement, but the public lands." *Id.* at 223.

This Court has consistently recognized this principle, noting it most recently in 2005 in *Alaska v.*

United States, 545 U.S. 75, 78-79 (2005). Lands granted to the state in the Act of Admission are thereafter vested in the state, subject only to federal enactments based on an enumerated power. As an aspect of retained sovereignty, the state has the power to alienate lands granted as part of the Act of Admission. *Pollard*, 44 U.S. at 223. Once a state has been admitted into the union, Congress loses the power convey lands that were transferred to the state. *Idaho*, 533 U.S. at 280 n.9; *Shively v. Bowlby*, 152 U.S. 1, 28 (1894); *Pollard*, 44 U.S. at 223.

In this case, the Hawaii Supreme Court did not interpret the Apology Resolution as "a law depriving [the] State of land vested in it by the Constitution." Such a law, without provision for payment of compensation, "would constitute a taking of the state's property without just compensation, in violation of the Fifth Amendment." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 291 (1983).

Nor did the state court interpret the Apology Resolution as effecting a transfer of state property to other private parties (as had happened in *Pollard*). Instead, the state court ruled that the Apology Resolution[2] altered the public trust purposes of the land grant and revoked the power of the state to alienate the land until it met further conditions.

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[2] The state court also purported to rely on state enactments for this change in the public trust. The power of the state legislature to alter the terms of the public trust outlining the purposes for which the land was granted is not before the Court in this case.

Any such changes mandated by the Apology Resolution would run afoul of the Equal-Footing Doctrine.

III

AS INTERPRETED BY THE HAWAII SUPREME COURT, THE APOLOGY RESOLUTION CONSTITUTES A NEW RESTRICTION ON ALIENATION OF LAND GRANTED AT STATEHOOD

This case arose when the state proposed to sell some of the granted lands pursuant to the public trust purpose in the Act of Admission of increasing home ownership. *See Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 177 P.3d 884, 890-91 (Haw. 2008) (*OHA*); Pub. L. 86-3, § 5(b). The state court enjoined the sale "until the claims of the native Hawaiians to the ceded lands has been resolved." *OHA*, 177 P.3d at 891. The court interpreted the Apology Resolution to impose a "fiduciary duty" on the state to retain the lands granted to the state in the Act of Admission until the "unrelinquished claims of the native Hawaiians have been resolved". *Id.* at 927.

As noted above, this interpretation of the Apology Resolution sees the Congressional action as neither a taking of the property nor an actual transfer of the property to a third party. Instead, the state court interpreted the Apology Resolution as a ***new*** restriction on state power. Forty-four years after the lands were granted to the state in the Act of Admission, the Apology Resolution—according the Hawaii Supreme Court—revoked the power of the state to sell the granted lands. No longer could the

lands in question be used to support public education or promote home ownership. Instead, the lands must now be devoted to resolution of "unrelinquished claims" of the descendants of native Hawaiians alive at the time of the Hawaiian monarchy.

This restriction on state power is no more permissible under the Equal-Footing Doctrine than an attempt by Congress to deed state properties to third parties. *See Pollard*, 44 U.S. at 223.

The issue here is not simply ownership and control of the property. Instead it is sovereign power of the state. Once the United States has granted property to a state as part of the Act of Admission, the federal government may not alter the terms of the grant. To do so would treat the state as a "mere province." *See Alden*, 527 U.S. at 715. Just as Congress could not dictate to Oklahoma where the state capitol could be located after admission (*Coyle*, 221 U.S. at 566-67), Congress cannot dictate new restrictions on use and alienation of state property to Hawaii.

The Founders took the concept of "equal footing" quite seriously. In the debate over the Enabling Act of 1802 that set the terms for the admission of Ohio, the issue of Congressional power vis-à-vis new states was presented. The proposal required Ohio to convene a constitutional convention and specified how delegates to that convention were to be apportioned. Congressman Nicholson objected to the provision—contending that it was a matter solely for the determination of Territory. 11 *Annals of the Congress of the United States, 1789-1824* (1834-56),

March 1802, H.R. 7 Cong., 1 Sess., at 1112-14.[3] Ultimately, the debate was won by those who contended that Congress could set the *initial* conditions for statehood, yet the matter was one of significant contention. Both sides of the debate seemed intent on ensuring that once admitted, Ohio would hold the same sovereign powers as the current states.

That debate stands in stark contrast to the state court's interpretation of the Apology Resolution. There is no discussion in that resolution of the sovereign powers of the State of Hawaii. Nor is there reference to any enumerated power in the Constitution that would authorize Congress to impose new restrictions on the state's power to sell the property.

Among the sovereign power of the state is certainly the power to dispose of state lands. *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 65-66 (1873). In this case, the granted lands were impressed with a public trust. Like every other state admitted to the union since the ratification of the constitution, Congress provided a grant of lands to support public education in the new state. Christopher J. Walker, *The History of School Trust Lands in Nevada: The No Child Left Behind Act of 1864*, 7 Nev. L.J. 110, 112-19 (2006). Yet, while the federal government intended to help finance public education with these grants, it recognized that the provision of public education was a state government function. *Id.* at 114. The granted land was provided as a resource

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[3] *Available at* http://memory.loc.gov/ammem/amlaw/lwaclink.html (last visited Dec. 7, 2008).

for states to use as a means of financing that state function.

While Congress might impose a public trust on the granted lands, it lost power to impose further restrictions once the lands were transferred to the state. *See Summa*, 466 U.S. at 205; *Pollard*, 44 U.S. at 223. Yet that is precisely what the Hawaii court ruled occurred when Congress adopted the Apology Resolution. The state court ruled that the resolution displaced state sovereign power to alienate (in accord with a public trust) lands granted to the state. Instead, according the Hawaii Supreme Court, the Apology Resolution requires the state to preserve the lands granted in the Act of Admission for use in satisfying unstated claims of the native Hawaiians—a purpose not mentioned in the Act of Admission.

If that is what Congress intended, then Congress exceeded its authority. Because Hawaii was admitted on an equal footing with the other 49 states, Congress had no power to revisit its grant of lands to the state 44 years after the fact, and impose new restrictions on the state power to alienate that land. Disposition of state lands granted in the Act of Admission is clearly a power reserved to states under our dual system of government. While Congress is free to act under a specific delegated power, it cannot interfere with state sovereign powers.

Congress remains free, acting under its delegated powers, to address any claims of native Hawaiians. The claim here revolves around loss of land—something this Court has consistently ruled can be remedied by the payment of monetary compensation. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244-45 (1984).

CONCLUSION

The meaning and effect of the 1993 Apology Resolution adopted by Congress and signed by President Clinton is subject to dispute as outlined in the briefs of the parties. If, however, the resolution is interpreted to mean that Congress intended to restrict Hawaii's power to alienate lands granted to the state in the Act of Admission, the action clearly exceeded Congress' authority. States retain sovereign power and are not mere functionaries of the federal government. Thus, the exercise of federal power must be predicated on a power enumerated in the Constitution. No such power would support the authority of Congress to restrict the power of the state to dispose of state owned lands. There is no question that the state proposed to use the lands for the public trust purposes specified in the Act of Admission. The Hawaii Supreme Court erred in holding that Congress could add new conditions restricting the power of states to alienate state-

owned property. The decision of the Hawaii Supreme Court should be reversed and the injunction dissolved.

DATED: December, 2008.

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AMICUS CURIAE BRIEF

114

No. 07-1372 (14)

Supreme Court, U.S.
FILED
DEC 11 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF OF AMICUS CURIAE COMMISSIONER OF PUBLIC LANDS FOR THE STATE OF NEW MEXICO IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This brief is filed in support of the Petition for a Writ of Certiorari by Patrick H. Lyons, in his capacity as the Commissioner of Public Lands for the State of New Mexico (hereinafter, the "Commissioner"). The Commissioner serves as the State's constitutional trust officer charged to direct, control, care for and dispose of lands granted in trust by the United States to the State of New Mexico in the New Mexico Enabling Act (Act of Congress dated June 29, 1910, Pub. L. 61-219, Ch. 310, 36 Stat. 557).[2] The Commissioner holds in trust approximately 9 million acres of surface estate and approximately 13 million acres of mineral estate statewide. New Mexico, like Hawaii, is one of 26 states that, when admitted to the Union, received land from the federal public domain to manage for the purpose of generating the income needed to create and maintain essential state institutions.

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[1] This brief was not authored, in whole or in part, by counsel for any party, and no person or entity other than amicus and its counsel contributed monetarily to the preparation or submission of the brief. Counsel for Petitioners and counsel for Respondents consented by letter to the filing of the amicus curiae brief at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

[2] The State of New Mexico, through its Attorney General, has joined with various other states in filing an amicus brief. The Commissioner is writing separately to provide an additional perspective from the point of view of a trust officer entrusted specifically with the responsibility to carry out the State's obligations under the New Mexico Enabling Act.

As set forth in the Enabling Act, these lands were granted by the federal government to the State in trust to support public schools, public institutions of higher learning, and various other public institutions. The amount contributed to the beneficiaries overall budgets varies from year to year, but is always significant. For example, in 2007 the income from state trust lands constituted 22% of the budget of New Mexico public schools, 10% of the budget of the New Mexico School for the Visually Impaired, and 25% of the budget of the New Mexico Military Institute.

A significant portion of state trust income is achieved through land sales and exchanges. Because of the importance of these resources in supporting vital public institutions throughout the State, the State has a strong interest in any decision that suggests that the state's ability to alienate trust lands for the benefit of the trust and its beneficiaries can be substantially restricted by Congressional action such as the Joint Resolution at issue in this case.

The Court previously has addressed issues pertaining to the New Mexico Enabling Act and the contemporaneously adopted Arizona Enabling Act. *See Ervien v. United States*, 251 U.S. 41 (1919); *Lassen v. Arizona Hwy. Dept.*, 385 U.S. 458 (1967). Because the express trust created under the Hawaii Admission Act was based on principles established in the New Mexico and Arizona Enabling Acts, the Commissioner is well situated to provide background and analysis regarding the federal law issues raised by the Hawaii Supreme Court's unprecedented

injunction barring state alienation of lands held in a similar federal law trust.

SUMMARY OF ARGUMENT

The decision of the Hawaii Supreme Court imposes an unprecedented restriction on the alienation of lands granted by the federal government to provide support for schools and other public benefits. The court found authority for that restriction in the Apology Resolution (The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993)), passed by Congress 34 years after the federal government granted the lands to the state in trust and established the terms of the trust. In granting federal lands to the State of Hawaii in trust upon its admission into the Union, Congress followed a practice that had evolved from the earliest days of the Union to allow new states to be admitted on an equal footing with existing states. Under this well-established practice, the lands were granted to newly admitted states pursuant to a solemn compact under which the states agreed not to tax federal lands in the state and, in exchange, acquired lands which could be used to support vital public institutions. Because the granted lands cease to be federal property and no federal power is reserved to substantially restrict the states' ability to alienate the granted lands for the benefit of the trust and its beneficiaries,

the Apology cannot have the effect that the Hawaii Supreme Court gave it.

Although Congress clearly could have retained the power to restrict alienation of the granted land, it did not do so; the only federal authority reserved was enforcement of the terms of the trust. If the federal government could alter its grant in the manner determined by the Hawaii court, fundamental principles of federalism would be violated. And, fundamental trust principles would be altered if the federal government, as settlor, could establish a trust, make an irrevocable grant to the trust, and then seek to take back all or a part of the trust corpus. Only if the Hawaii Supreme Court had first determined that the trustee's discretion regarding disposition of trust assets was arbitrary and capricious, and thus a violation of the terms of the trust, could it have enjoined the trust as it did. No such determination was made by the Court. For these reasons this Court should grant the Petition of the State of Hawaii.

ARGUMENT

I. CONGRESS DID NOT INTEND THE APOLOGY TO INCLUDE RESTITUTION.

The Hawaii Supreme Court was improperly persuaded that language in the Apology warranted an injunction against the alienation of trust land. The Joint Resolution, however, is not remedial legislation. T.C. Memo. 2000-11, 2000 WL 15087 (U.S.TaxCt.).

Where Congress intends an Apology such as this one to include Restitution, it clearly states that Restitution is intended. *See* Radiation Exposure Compensation Act of 1990, Pub. L. No. 101-426, 104 Stat. 920. In enacting the Radiation Exposure Compensation Act, the federal government apologized to individuals exposed to the Government's atmospheric nuclear tests which exposed individuals to radiation. The law gave restitution for improper acts by the federal government. As in the Hawaii case, Congress made a formal apology. *Id.* at § 2(c) ("Apology. – The Congress apologizes on behalf of the Nation to the individuals described in subsection (a) and their families for the hardships they have endured."). Congress also provided specifically for restitution. *Id.* at § 2(b) ("It is the purpose of this Act to establish a procedure to make partial restitution to the individuals described in subsection (a) for the burdens they have borne for the Nation as a whole."). Congress went on to set forth a plan for restitution. The Apology at issue here is drafted as merely an apology. Given its lengthy nature people may wish that restitution was intended. However, even if restitution was intended it could not legally be accomplished by using state trust lands which the Federal Government has given to the State.

II. THE TRUST LANDS WERE GRANTED PURSUANT TO A BILATERAL COMPACT, WHICH CANNOT BE CHANGED UNILATERALLY.

Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools. The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963). The federal government made the grants to the states in "a solemn bilateral compact" between the federal government and each of the states with "[t]itle to the sections vested in the State." *See Andrus, infra* at 523. And, it is black letter law that a bilateral agreement cannot be changed unilaterally. If the federal government had intended its Apology to impact the disposition of grant lands, this would have been a unilateral disposition.

As the grantor, the federal government does not have the power to enjoin the state from alienating state trust lands once title has passed to the state. *Andrus*, 446 U.S. 500, 506-507. In *Andrus*, this Court determined that the federal government had the power to dispose of grant lands prior to a survey, and thus prior to title passing to a State. In this case surveys were complete, the Federal Government's grant was complete, and title passed long before the Apology. At the time of the Apology the federal government clearly did not have the power to dispose of grant land. Congress would certainly have

understood that and could not have intended more than an Apology.

Moreover, under the equal footing doctrine, all states are admitted to the Union with the same attributes of sovereignty as the original 13 States. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). This doctrine prevents the Federal Government from impairing the fundamental attributes of state sovereignty when it admits new States into the Union. *Id.*

III. THE APOLOGY RESOLUTION COULD NOT RESTRICT ALIENATION OF HAWAII'S TRUST LANDS BECAUSE CONGRESS HAS NO PROPERTY CLAUSE POWER TO IMPOSE RESTRICTIONS BEYOND THOSE CONTAINED IN THE ADMISSION ACT.

Congress does not have the authority to restrict the State of Hawaii's alienation of lands granted to Hawaii in trust at statehood; to do so would be contrary to the terms of the Admission Act trust. Because the granted lands are no longer federal property subject to Congressional regulation under the Property Clause of U.S. Const., art. VI, § 3, and Congress has no other authority under which it can restrict alienation of the granted lands, the court's decision is incorrect as a matter of federal law.

The history surrounding federal land grants to states reaches back to the Land Ordinance of 1785[3] and the Northwest Ordinance of 1787.[4] *See Andrus v. Utah*, 446 U.S. 500, 522-525 (1980) (Powell, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 268-70 (1986). When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. However, when settlers sought to carve the State of Ohio from the Northwest Territory in 1802, the federal government owned much of the land within the boundaries of the proposed State, which land was immune from taxation. In order to place Ohio on an equal footing with the original States, Congress enacted a compromise, which set a pattern followed in the admission of virtually every other State. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. *See generally* Paul Wallace Gates, *History of Public Land Law Development*

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[3] The Land Ordinance of 1785 "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township. . . ." 1 Laws of the United States 565 (1815).

[4] Article III of the Northwest Ordinance of 1787 declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52. Article IV provided that legislatures established in the region could not "tax . . . the property of the United States" or interfere with the Federal Government's disposal of the public lands. *Id.*

(1968). Over time, the grants included additional lands to support other public institutions. These agreements were solemn bilateral compacts between each State and the Federal Government. *Andrus*, 446 U.S. at 523.

Although the initial grants to states did not specifically proscribe the disposition of the lands, the need for clear Congressional authorization to sell, in order to raise adequate funds, resulted in special legislation that granted this authority to new states. Thereafter, Congress began to specifically restrict the manner of sales in order to assure that a fair price be obtained. There is thus no question that Congress' purpose in supporting education has consistently been expressed as the intention that the lands be alienable (sold) as a means of providing the necessary funds. *See* Jon A. Souder & Sally Fairfax, *State Trust Lands* (1996) at 30-31.

In the Hawaii Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, admitting Hawaii as a state, the United States granted to the State of Hawaii, with certain specified exceptions, "title to all the public lands and other property . . . within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union." *Id.* at § 5(b). Section 5(b) states that this grant "shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii." *Id.* Section 5(f) provides that the granted lands, together with the proceeds from

the sale or disposition of any such lands and the income therefrom, "shall be held by said State as a public trust" for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Section 5(f) further provides that use of the lands and proceeds "for any other object shall constitute a breach of trust for which suit may be brought by the United States[.]"

In imposing a federally-enforceable trust on the granted lands and the proceeds and income derived from the lands, Congress followed a practice that had developed over time to ensure that the grants were properly administered. *See Lassen*, 385 U.S. at 460-461; *Papasan*, 478 U.S. at 289 n. 18. Authority for the grants and the imposition of the trust came from the Admissions Clause of U.S. Const., art. IV, § 3 and the Property Clause, art. VI, § 3. *See generally Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 635-36 (10th Cir. 1998) (discussing Admissions Clause and Property Clause authority for statehood land grants and trust restrictions). However, while the federal government retained authority to enforce the terms of the trust, where one was imposed, it did not retain a continuing ownership interest in the lands, and thus did not retain continuing Property Clause power to further regulate the disposition of the lands.

Under general trust principles, once a trust is created, the trust terms cannot be altered except by the exercise of a reserved power to do so. *See* 2 *Restatement (Third) of Trusts* § 63; Bogert, *Trusts & Trustees*, § 42 (2d ed. 1965). This principle applies to charitable trusts. *See* 2 *Restatement (Second) of Trusts* § 367 (1959) at 245 ("If a charitable trust has been validly created, the settler cannot revoke or modify it unless he has by the terms of the trust reserved the power to do so."). Here, Congress expressly created a trust when granting the lands to the State of Hawaii, and, in doing so, Congress clearly anticipated the application of general trust principles, including the principle barring modification of the trust except through the exercise of powers reserved at the time that the trust was created.

In *Coyle v. Secretary of State of Oklahoma*, 221 U.S. 559 (1911), the Court held that the Oklahoma legislature could properly enact a legislative act permitting the relocation of the state capital from Guthrie to Oklahoma City, contrary to a provision of the Oklahoma Enabling Act, because such action was within a state's sovereign power after it was admitted to the Union. As the *Coyle* court said, "The [Admissions Clause] power, is to admit 'new States into this Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567. Thus, in the absence of some Constitutional authority delegated to Congress, Congress had no

authority to impose further restrictions on the granted lands other than those imposed by the Hawaii Admission Act.

In finding that the Apology Resolution prohibits alienation of the granted lands, the Hawaii Supreme Court assumed that Congress had authority to do so. Because that assumption is not warranted this Court should reverse the decision of the Hawaii Supreme Court.

IV. THE HAWAII SUPREME COURT'S DECISION SHOULD BE REVERSED BECAUSE THE COURT INCORRECTLY DETERMINED THAT THE APOLOGY IMPACTED HAWAII'S SOVEREIGN AUTHORITY TO ALIENATE STATE LAND.

Because Congress did not reserve the power to modify the terms of the trust to further restrict the state's ability to alienate the trust lands, Congress did not, and does not have, the authority to do so. While the power to dispose of any kind of property belonging to the United States is vested in Congress. *Alabama v. Texas*, 347 U.S. 272 (1954); U.S. Const. art. IV, § 3, cl. 2; 43 U.S.C.A. § 1301 et seq. once that property has been disposed of without reservation, Congress no longer has the power to place restrictions on the property through a Congressional Act such as the Apology. If Congress wants to restrict the alienation of trust property it can do so through other means including eminent domain. And, if

Congress had intended to modify the trust with the Apology it would have done so clearly and specifically.

Congress is well aware that states have relied for decades on the authority to alienate trust lands in determining the policies and procedures governing these lands. Reliance on the rule of law is a fundamental principle essential to the proper management of state trust lands and to the proper functioning of our legal system.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Hawaii Supreme Court.

Respectfully submitted,

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December 11, 2008

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 07-1372

IN THE

Supreme Court of the United States

HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Hawaii

BRIEF OF CURRENT AND FORMER HAWAII STATE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI CURIAE*[1]

This appeal arises from a decision of the Hawaii Supreme Court, holding that the State of Hawaii's sale or transfer of certain lands it holds in trust constitutes a breach of trust and issuing an injunction forbidding the State from selling or transferring these lands until such time as the ongoing reconciliation process among the state and federal governments and native Hawaiians is completed. One critical, preliminary issue in this case is whether this Court has jurisdiction over the petition filed by the State of Hawaii *et al.* ("Hawaii" or "the State"). Specifically, respondents, the Office of Hawaiian Affairs *et al.* ("OHA"), contend that the petition does not present a substantial federal question and that the judgment of the Hawaii Supreme Court rests on an independent and adequate state ground. See Resp'ts' Br. at 32-34. They assert that the decision below makes clear that Hawaii state law independently supports the court's findings and conclusions and is adequate to support the issuance of the injunction. See *id.* As such, OHA argues that this Court lack jurisdiction over this case. See *id.*

Amici are current and retired officials of all three branches of the Hawaii state government and include a retired Chief Justice of the Hawaii Supreme Court, a former Governor, and the President of the Hawaii State Senate.

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amici curiae* made any monetary contribution for the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

Amicus William S. Richardson was the first native Hawaiian Chief Justice of the Hawaii Supreme Court, holding that position from 1968 until 1982. He was also the founder of Hawaii's first and only law school which now bears his name. While on the bench, Chief Justice Richardson participated in a series of decisions that were responsible for the integration of the principles of Anglo-American and indigenous Hawaiian law. In addition, Chief Justice Richardson has experience in the executive branch of the Hawaii state government, serving as Lieutenant Governor from 1962 until 1966.

Amicus John D. Waihee was the fourth Governor of the State of Hawaii, holding that position from 1986 to 1994; he was the first native Hawaiian to hold the office. Governor Waihee was in office during the centennial anniversary of the overthrow of Queen Lili'uokalani and signed into law myriad state statutes regarding native Hawaiian rights, including many of the state statutes at issue. Before his election, Governor Waihee was Lieutenant Governor and a member of the Hawaii State House of Representatives. He also was a delegate to the 1978 Hawaii State Constitutional Convention and was instrumental in the creation of the Office of Hawaiian Affairs and in defining the public lands trust.

Amicus Colleen Hanabusa has represented the people of the Twenty-First Senatorial District, a district on the Wai'anae Coast comprised of a high percentage of native Hawaiians, since 1998.[2] Senator Hanabusa was elected Senate President in 2007 and previously served as the Chair of the Judiciary and

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[2] Senator Hanabusa's views do not necessarily reflect those of the Hawaii State Senate. No State Senate funds were used in the preparation or submission of this brief.

Hawaiian Affairs Committee. In addition, she served on the Task Force on Native Hawaiian Issues State Working Group, one of five working groups convened to advise the Hawaii Congressional Delegation on the drafting of federal legislation to clarify the relationship between native Hawaiians and the federal government. Before her election to the State Senate, Senator Hanabusa practiced law for 30 years and served as a delegate to the Hawaii State Judicial Conference.

Based on their years of experience in state government and unique insight into the Hawaii legal system and Hawaii state law, *Amici* are exceptionally qualified to analyze the decision of the Hawaii Supreme Court and to provide an assessment of the independence of the Hawaii state law bases for the issuance of the injunction.

SUMMARY OF ARGUMENT

1. This Court is without jurisdiction over Hawaii's appeal because the Hawaii Supreme Court's judgment does not present a substantial federal question. The Hawaii Supreme Court considered OHA's claim, brought under the Hawaii Constitution, that the State's sale of ceded lands[3] violated the exacting fiduciary standards that state constitutional

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[3] The term "ceded lands" refers to the approximately 1.75 million acres of land that were government and crown lands of the Hawaiian kingdom and held for the benefit of all the Hawaiian people. *See* Melody K. MacKenzie, *The Ceded Lands Trust, in Native Hawaiian Rights Handbook* 26 (Melody K. MacKenzie ed., Native Hawaii Legal Corporation 1991). The government and crown lands were eventually ceded to the U.S. government, upon annexation in 1898. When Hawaii became a state, the lands were transferred to the State. *See id.* Today, they are held in trust by the State. *See id.* at 30-32.

and common law impose upon it, as trustee of the public lands trust. The court found that the State land sales at issue would violate established state-law standards regarding the State's fiduciary obligations to the beneficiaries of the public lands trust.

In deciding this state-law claim, the Hawaii Supreme Court cited the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter *Apology Resolution*]. But the court relied on the *Apology Resolution* for a limited purpose—to support its factual finding that native Hawaiians have unrelinquished claims to the ceded lands. See *Office of Hawaiian Affairs* v. *Housing & Cmty. Dev. Corp. of Haw.*, 177 P.3d 884, 901-03, 922 (Haw. 2008) [hereinafter *OHA*]. In making this finding, the court did not hold that the *Apology Resolution* itself provided OHA with any substantive rights or claims (including claims to the ceded lands) or imposed any burdens, liabilities, or obligations on the State. Instead, the court concluded that the factual findings contained in the *Apology Resolution* recognize that native Hawaiians have unrelinquished claims over the ceded lands and contemplate native Hawaiians' future reconciliation with the state and federal governments as to those claims. See *id.* at 902, 905, 923. The court also concluded that state laws recognize the same facts and support the same conclusions. See *id.* at 903-04, 923.

Any limited federal question presented by the Hawaii Supreme Court's reliance on the *Apology Resolution*, as well as state law, in making its factual findings, is insufficient to provide this Court with jurisdiction under 28 U.S.C. § 1257. That provision

authorizes this Court to review only state court judgments that present *substantial* federal questions. A state court's citation, *inter alia*, to a federal statute in stating facts relevant to its decision of a claim that indisputably arises under state law does not create a substantial federal question. Any federal "question" presented is wholly ancillary to the state-law cause of action, not necessary to its resolution, and "merely formal." *Equitable Life Assurance Soc'y* v. *Brown*, 187 U.S. 308, 311 (1902). Accordingly, it is insufficient to confer jurisdiction under section 1257.

2. This Court also lacks jurisdiction over the instant case because the Hawaii Supreme Court's opinion expressly sets forth a state-law ground for decision that is independent from the *Apology Resolution* and adequate to support the judgment. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040-42 (1983). The Hawaii court concluded that state law covers the same ground as the *Apology Resolution*, in so far as it too acknowledges that native Hawaiians have unrelinquished claims to the ceded lands and contemplates that the state and federal governments will seek reconciliation with native Hawaiians with regard to those claims. The Hawaii court made clear, in several passages in its decision, that its construction of state law independently supported its ruling on OHA's breach of trust claims and that state law mandated issuance of the injunction. The state court opinion thus "plain[ly] state[s]" an independent and adequate state ground for the judgment. See *id.* at 1042.

3. Finally, the State makes two arguments that this Court should exercise jurisdiction notwithstanding the independent and adequate state grounds for the Hawaii court's decision.

First, the State contends that, despite the state-law ground for the decision, there is an Article III case or controversy over the federal question because this Court's interpretation of the *Apology Resolution* might affect the political machinations in the Hawaii State Legislature. This argument is based on a footnote in *Florida* v. *Meyers*, 466 U.S. 380, 381 n.* (1984) (per curiam). There, this Court suggested that it might address a federal question, even where there exists an independent and adequate state ground for a state court decision, when this Court's "resolution of [the federal] issue will affect the proceedings below regardless of how the [state court] rules on remand." *Id.* This Court has not taken up this suggestion since 1984, and in all events, the case at issue does not fall within its parameters. This Court's interpretation of the *Apology Resolution* will not affect the lower court's resolution of the state-law claim before it and thus will not "affect . . . how the [state court] rules on remand." *Id.* (first alteration in original). Moreover, a case does not present an Article III case or controversy if the sole consequence of its resolution is some speculative impact on the Hawaii state political process. See *GTE Sylvania, Inc.* v. *Consumers Union of U.S., Inc.*, 445 U.S. 375, 382 (1980) (Article III case or controversy is justiciable only if it is capable of "resolution through the judicial process." (quoting *Flast* v. *Cohen*, 392 U.S. 83 (1968))).

Second, the State maintains that this Court has jurisdiction, despite an independent and adequate state ground for the decision below, because the Hawaii court's construction of state law conflicts with federal law. This potential basis for jurisdiction is waived because it was neither pressed nor passed upon below; nor is it fairly embraced in the question presented in the petition for a writ of certiorari. See

Taylor v. *Freeland & Kronz*, 503 U.S. 638, 645-46 (1992).

ARGUMENT

The State asks this Court to address and overturn a judgment of the Hawaii Supreme Court on a state-law claim that rests on an interpretation of the Hawaii Constitution and state common law. The State asserts that this Court has jurisdiction to do so because the state court cited and relied upon factual findings contained in a federal statute, among other authorities, in resolving OHA's state-law claim for injunctive relief. The lower court's reliance on a federal statute as one among several independent sources of factual findings relevant to the state-law claim it resolved is insufficient to confer jurisdiction on this Court.

The federal question presented by this case is insubstantial and ancillary, and the Hawaii court rested its decision upon an interpretation of state law that is independent from federal law and adequate to support the judgment. "[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977). This Court, accordingly, does not have jurisdiction over this case. See *California* v. *Freeman*, 488 U.S. 1311, 1314 (1989) (dismissing certiorari as improvidently granted where state court decision rested on a foundation of state law); *Colorado* v. *Nunez*, 465 U.S. 324 (1984) (per curiam) (dismissing certiorari "as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate state grounds").

I. HAWAII'S PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The State invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). That section provides in relevant part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under . . . statutes of . . . the United States." This Court has interpreted section 1257 to vest it with jurisdiction to review a state-court judgment only where that judgment presents a "*substantial* federal question[ ]." *Palmer Oil Corp.* v. *Amerada Petroleum*, 343 U.S. 390, 391 (1952) (per curiam) (emphasis added). "'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court.'" *Equitable Life Assurance Soc'y* v. *Brown*, 187 U.S. 308, 311 (1902) (quoting *New Orleans Waterworks Co.* v. *Louisiana*, 185 U.S. 336, 345 (1902)). To the extent this case presents any federal question, it does not present a substantial one. The Hawaii court's citation of and reliance on the *Apology Resolution* as one of several sources of the factual background against which it rendered a decision on a state-law claim is insufficient to confer jurisdiction under section 1257.

As the opinion plainly reveals, the judgment being reviewed was founded upon state substantive law—to wit, an interpretation of the Hawaii Constitution and state common law. OHA's claim against the State brings a private cause of action under article XII, section 4 of the Hawaii Constitution.[4] It alleges that

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[4] Article XII, § 4 provides in whole:

the State's sale of ceded lands generally, and of the Leiali'i parcel particularly, would constitute a breach of the State's fiduciary obligations as trustee of the public lands trust established in that same provision of the state constitution. See J.A. 32a-34a.

The Hawaii court expressly concluded that OHA's claim for injunctive relief under the state constitution was proper. The court recognized that the individual native Hawaiian plaintiffs were "beneficiaries of the ceded lands trust" and therefore that they had the "right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust." *OHA*, 177 P.3d at 904 (quoting *Pele Defense Fund* v. *Paty*, 837 P.2d 1247, 1262 (Haw. 1992)). The court also found that OHA was a proper plaintiff and could bring suit under article XII, section 4 because it was "representing the interests of the native Hawaiian beneficiaries to the ceded lands trust." *Id.* at 905.

Turning to the merits of OHA's claims, the Hawaii Supreme Court considered whether, under the circumstances, the sale of ceded lands would violate the State's obligations under article XII, section 4 to "'adhere to high fiduciary duties normally owed by a trustee to its beneficiaries.'" *Id.* at 904 (quoting *Ahuna* v. *Dep't of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982) (Richardson, C.J.)). In

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> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Haw. Const. art. XII, § 4.

particular, the court looked to the State's "three specific trust duties" as trustee under state law:

> (1) "the obligation . . . to administer the trust solely in the interest of the beneficiary"; (2) the obligation that the trustee "deal impartially when there is more than one beneficiary"; and (3) the "obligation to use reasonable skill and care to make trust property productive[.]"

Id. at 905 (quoting *Ahuna*, 640 P.2d at 1169-70).

The court agreed with OHA that, in light of the native Hawaiians' unrelinquished claims over the ceded lands, the State's sale of these lands would violate the "exacting fiduciary standards" to which the State was held under state law—specifically, the State's "'obligation to use reasonable skill and care' in managing the public lands trust." *Id.* (quoting *Ahuna*, 640 P.2d at 1169).

The Hawaii court's decision, accordingly, rested entirely on a foundation of state substantive law. OHA's cause of action arises under state law—article XII, section 4 of the Hawaii Constitution—and the Hawaii Supreme Court rendered a judgment on the merits of OHA's claims based on its definitive interpretation of state trust law. "One is hard pressed to imagine an area of law more traditionally a province of state law, than the law of trust," *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 69 (3d Cir. 1994), except perhaps, as is the case here, when the law of trust is embedded in a provision of the state constitution. See *Freeman*, 488 U.S. at 1313 ("Interpretations of state law by a State's highest court are, of course, binding upon this Court."); *Badger* v. *Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937) ("[T]he interpretation and construction of the

Constitution of a state is peculiarly within the province of the highest court of the state . . . .").

"[C]omity and respect for federalism compel [this Court] to defer to the decisions of state courts on issues of state law" because "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (per curiam) (Rehnquist, J., concurring). This Court should decline the State's request to review the Hawaii Supreme Court's interpretation of state constitutional and common law.

The State claims, however, that this case presents a substantial federal question for resolution by this Court because the Hawaii Supreme Court examined the *Apology Resolution* as part of the factual context for its determination of the content of the State's fiduciary duties under state law. The lower court's discussion of the *Apology Resolution* gives rise at best to a "formal" federal issue that is insufficiently substantial to vest this Court with jurisdiction under section 1257. The *Apology Resolution* is only one of the sources that the lower court cited in concluding that the native Hawaiian people have unresolved and unreleased claims to the ceded lands and that a process of reconciliation among the federal and state governments and native Hawaiian people is ongoing. See *OHA*, 177 P. 3d at 900-05, 922-23. The state-law sources for these conclusions are independently sufficient. See *infra* Part II.

This Court's jurisprudence addressing when a federal question is "substantial" within the meaning of section 1257 is sparse, with *Equitable Life Assurance Society*, *supra* p. 5, providing the only extended discussion. *Amici* submit, however, that this Court should look for guidance to its

interpretation of 28 U.S.C. § 1331,[5] which grants district courts jurisdiction over civil actions presenting substantial federal questions. In *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, this Court concluded that a federal issue is presented only if it "really and substantially involve[es] a dispute or controversy respecting the validity, construction or effect of [federal] law." 545 U.S. 308, 313 (2005) (internal quotation marks omitted) (alteration in original); see *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 814 (1986) ("'[A] suit does not so arise [under federal law] unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of . . . a law, upon the determination of which the result depends.'" (quoting *Shulthis* v. *McDougal*, 225 U.S. 561, 569-70 (1912)). The Court has cautioned that

> countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute . . . . To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.

Gully v. *First Nat'l Bank*, 299 U.S. 109, 118 (1936). Thus, where a federal statute simply "touche[s] on" a legal claim "at a single point," and otherwise, the "right of the plaintiff to recover [is] left to be determined by the law of the state," the federal

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[5] Section 1331, which is captioned, "Federal Question," provides in whole: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2009).

question presented generally is not substantial and the federal courts lack jurisdiction. See *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 216-17 (1934). That is the situation here.

The State seeks to paint the limited and ancillary federal issue related to this case as substantial, but its characterization of the Hawaii Supreme Court's decision does not survive a natural reading of the opinion. The Hawaii Supreme Court made clear that the *Apology Resolution* was not the source of OHA's private cause of action. See *OHA*, 177 P.3d at 904. Instead, OHA pursued and the court recognized a cause of action under the state constitution. *Id.* (Plaintiffs brought "suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust." *Id.* (internal quotation marks omitted)). And the court did not hold that the *Apology Resolution* prevented the State from selling the ceded lands or created native Hawaiians' claims over the ceded lands or imposed fiduciary obligations on the State. See, *e.g.*, *id.* at 902 ("We agree with the OHA plaintiffs that the 'Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people[.]'" (alterations in original));[6] *id.*

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[6] The State repeatedly contends that the Hawaii Supreme Court held that the *Apology Resolution* "clouded" the State's title to the ceded lands. *See, e.g.*, Pet'rs Br. at 2, 20, 24, 25, 27, 33, 38, 47, 48. In so doing, they mischaracterize the Hawaii court's decision. Although OHA may have argued below that the *Apology Resolution* clouded the State's title to the ceded lands in so far as native Hawaiians have some type of claim over the ceded lands, the Hawaii Supreme Court ruled in OHA's favor on a different ground—that the State's sale of the ceded lands would violate its fiduciary duty "to use reasonable skill and care' in managing the public lands trust" in light of native Hawaiian's unrelinquished claims over those lands. *OHA*, 177

(noting that the *Apology Resolution* merely acknowledges that native Hawaiians have unrelinquished claims over the ceded lands); *id.* at 904-05 (describing State's trust obligation under the Hawaii Constitution and related state statutes).

Indeed, the question presented by this case is *not* the question set forth in the petition because the Hawaii Supreme Court did not hold—or even intimate—that the *Apology Resolution*

> strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29 percent of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

Pet. for Cert. at i; see *Hawaii* v. *Office of Hawaiian Affairs*, No. 07-1372 (U.S. Oct. 1, 2008) (granting certiorari). The lower court's decision about the nature and extent of the State's obligations vis-à-vis the ceded lands were based upon a construction of the Hawaii Constitution and state common law defining the State's fiduciary duties as trustee of the public lands trust. See *OHA*, 177 P.3d at 904-05, 923. The Hawaii Supreme Court did not hold that the *Apology Resolution* was the source of any substantive claims, rights, liabilities, or obligations.

In reality, the Hawaii Supreme Court did not rely on the *Apology Resolution* in its legal analysis. Instead, it relied on the *Apology Resolution* as one of a number of authorities, including state statutes, that

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P.3d at 905. The only reference to clouded title in the Hawaii court's opinion is in characterizing the parties' arguments, *see id.* at 899, 912, 914, 919, not in analyzing the merits of OHA's claims or the issuance of the injunction.

supported its factual finding that native Hawaiians have unsettled claims over the ceded lands. In this context, the question whether the *Apology Resolution* supports this factual finding, although federal in nature, cannot be described as substantial. The Hawaii high court stated that the *Apology Resolution* "*acknowledges only* that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims." *Id.* at 902 (emphasis added). The court looked solely to the *Apology Resolution*'s factual findings—*i.e.*, the whereas clauses—in particular, to Congress's acknowledgement that the United States had taken the "crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the [n]ative Hawaiian people of Hawaii or their sovereign government," who "never directly relinquished their claims to their inherent sovereignty . . . over their national lands to the United States." *Id.* at 901 (quoting the *Apology Resolution*) (first alteration in original). And the Hawaii court concluded that the *Apology Resolution* recognized the factual basis for native Hawaiians' claims over the ceded lands. *Id.* at 901-02, 922. The Hawaii court's reliance on the *Apology Resolution* went no further, and it relied on several other sources for this same proposition. See, *e.g.*, *id.* at 903-04 (citing 1997 Haw. Sess. Laws Act 329; 1993 Haw Sess. Laws Act 359; 1993 Haw Sess. Laws Act 354; 1993 Haw. Sess. Laws Act 340).

Where, as here, a state court holds that only a state-law claim is made and makes clear that no element of that claim depends solely or significantly on federal law, review of that decision does not present for this Court a *substantial* federal question. See *City of Chicago* v. *Int'l Coll. of Surgeons*, 522 U.S.

156, 164 (1997) (A "federal question exists when *a right or immunity created by the Constitution or law of the United States* is an element, and an essential one, of the plaintiff's cause of action." (quoting *Gully* v. *First Nat. Bank in Meridian*, 299 U.S. 109, 112 (1936) (emphasis added) (internal citation and alterations omitted))). This Court, accordingly, should dismiss the case for lack of jurisdiction.

II. THE HAWAII SUPREME COURT'S DECISION RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

In the alternative, this Court lacks jurisdiction because the Hawaii Supreme Court rested its decision upon independent and adequate state-law grounds. "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). If this Court's resolution of the federal question presented in a case will not change the outcome because the state court's judgment rests on state substantive law, this Court lacks jurisdiction to review the federal questions involved. See *id.* (citing *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945)).

In this case, the Hawaii Supreme Court's opinion made clear that its judgment rested on a parallel interpretation of state law that was both independent of the *Apology Resolution* and adequate to support its judgment. See *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (This Court lacks jurisdiction where independence and adequacy of state law ground is "clear from the face of the opinion."). As explained above, the Hawaii court merely looked to the *Apology Resolution*'s factual findings to support its conclusions that native Hawaiians have

unrelinquished claims over the ceded lands and that the federal and state governments contemplate reconciliation with native Hawaiians as to those claims. Critically, however, the Hawaii court also relied on four state statutes that it found *independently* supported these factual findings and conclusions.

Specifically, in addressing the merits of OHA's breach of trust claim, the Hawaii Supreme Court held that "[t]he above interpretation"—that native Hawaiians have unrelinquished claims over the ceded lands and that the government contemplates future reconciliation with native Hawaiians with regard to those claims—"*is also supported by related state legislation* enacted at around or subsequent to the adoption of the Apology Resolution—specifically, Acts 354, 359, 329, and 340."[7] *OHA*, 177 P.3d at 903-04 (emphasis added). The court expended nearly 900 words discussing the relevance of Hawaii Session Laws Acts 354, 359, 329, and 340 to this interpretation, without citation to federal law. Following this extensive discussion, the Hawaii court concluded that both "the Apology Resolution *and the aforementioned related state legislation* clearly contemplate that native Hawaiians (1) 'never directly relinquished their claims to . . . their national lands to the United States,' and (2) 'are determined to preserve, develop and transmit to future generations their ancestral territory.'" *Id.* at 905 (emphasis added) (alterations in original).

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[7] *See* 1997 Haw. Sess. Laws Act 329 pages 956-60; 1993 Haw Sess. Laws Act 359 pages 1009-13; 1993 Haw Sess. Laws Act 354 pages 999-1000; 1993 Haw. Sess. Laws Act 340, pages 803-06.

Later in the opinion, the Hawaii Supreme Court reaffirmed the independence and adequacy of the state law grounds for its judgment in discussing whether OHA had prevailed on the merits, one prong of the standard for the issuance of a permanent injunction under Hawaii state law. After discussing the *Apology Resolution*, the court stated: "*More importantly, the state legislature itself* has announced that future reconciliation between the State and native Hawaiians will occur" and again spent considerable time—approximately 500 words—identifying language from relevant state statutes that supported this conclusion. *Id.* at 923 (emphasis added). In the end, the Hawaii court characterized its holding on the merits of OHA's breach of trust claim as follows:

> In sum, *all of the aforementioned pronouncements* [including the *Apology Resolution* and Hawaii Sessions Laws Acts 359 and 329] indicate that the issue of native Hawaiian title to the ceded lands will be addressed through the political process. In this case, Congress, the *Hawai'i state legislature*, the parties, and the trial court *all* recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever. . . . [T]he *aforementioned pronouncements* as they relate and impact the plaintiffs' claim for injunctive relief *clearly support the plaintiffs' position* that the State has a fiduciary duty as trustee to protect the ceded

> lands pending a resolution of native Hawaiian claims.

Id. (emphases added).

The Hawaii Supreme Court thus parsed the language of state statutes and found that these state laws, like the *Apology Resolution*, acknowledge native Hawaiian's unrelinquished claims over the ceded lands and the federal and state governments' commitment to reconciliation with native Hawaiians with regard to those claims. The court, on several occasions, made clear that the state-law support for its factual conclusions was independent of the *Apology Resolution* and adequate to support its ruling on the breach of trust claims and its issuance of the injunction. As noted, the Hawaii court expressly concluded that: (1) its holding was "also supported by related state legislation," *id.* at 903, (2) both "the *Apology Resolution* and related state legislation" under-girded its ruling, *id.* at 905, 912, 916, 918, 922, 926, 927, and (3) "*all of* the aforementioned pronouncements," including the *Apology Resolution* and state statutes, acknowledged native Hawaiians' claims over the ceded lands, *id.* at 923 (emphasis added).

This language constitutes a "plain statement" that the state court rested its decision on state law grounds parallel to, but independent of, the *Apology Resolution*. See, *e.g.*, *Long*, 463 U.S. at 1042 (Where decision appears to rest on interwoven federal and state grounds, court lacks jurisdiction if it contains a "'plain statement' that [it] rests upon adequate and independent state grounds."). The State's contrary argument misunderstands the relevant standard. See Pet'rs' Br. at 21 & n.11. This Court has found language far less compelling than that cited above to satisfy *Long*'s "plain statement" test. See, *e.g.*,

Sochor v. *Florida*, 504 U.S. 527, 534 (1992) (State court's statement that "[n]one of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal . . . indicates with requisite clarity that the rejection of Sochor's claim was based on the alternative state ground that the claim was 'not preserved for appeal.'" (quoting *Vaught* v. *State*, 410 So. 2d 147 (Fla. 1982)). The opinion makes its state-law foundation sufficiently plain.

The State makes two arguments in response. *First*, it cites the following language in the Hawaii court's opinion:

> "[I]t was not until the Apology Resolution was signed into law on November 23, 1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis."

Pet'rs' Br. at 22 (quoting *OHA*, 177 P.3d at 913) (emphasis omitted). The State claims that this language reveals that the *Apology Resolution* created the factual basis for OHA's claims. And the State argues that OHA cannot avoid this problem by citing the four state statutes that the Hawaii court relied on because three of the four were enacted before the *Apology Resolution*. Thus the State concludes, "If the Hawaii Supreme Court had deemed these state law grounds independent of the *Apology Resolution* and adequate to support the judgment, it would not have concluded that [OHA's] cause of action did not even 'ar[i]se' until the later-enacted *Apology Resolution* was signed." *Id.* (second alteration in original) (emphasis added).

The State's argument ignores the context of the cited statement and the relevant legal analysis in the pertinent sections of the Hawaii court's opinion, described above. Equally to the point, the Hawaii Supreme Court highlighted that the state statutes at issue were "enacted at around or subsequent to the adoption of the Apology Resolution." *OHA*, 177 P.3d at 903. The plain import of the court's analysis is that the state legislature enacted legislation to the same effect as the *Apology Resolution* around the time that Congress enacted the *Apology Resolution*. Thus, the lower court's recognition that the *Apology Resolution* alerted native Hawaiians to the facts underlying unrelinquished claims to the ceded lands does not detract one whit from its simultaneous recognition that state law independently took the same path.

Second, the State also relies on the Hawaii court's characterization of OHA's argument that "[a]t the heart of plaintiffs' claims ... is the Apology Resolution," and that their "claim for injunctive relief is ... based largely upon the Apology Resolution." Pet'rs' Br. at 23 (quoting *OHA*, 177 P.3d at 899, 900) (emphasis omitted) (alterations in original). This argument misses the mark. Initially, the State ignores that OHA also argued before the state court that state law independently supported the state-law breach of trust claim and the issuance of an injunction. See, *e.g.*, J.A. 138a ("The pertinent issues in this appeal are: (1) given the statements in Act 354 (1993), Act 359 (1993) and the *Apology Resolution* (collectively '1993 Legislation') that admitted that Hawaiians have a claim to the ceded lands, would the State breach fiduciary duties as ceded lands trustee by selling ceded lands before that claim is

resolved . . . ."). More importantly, the Hawaii Supreme Court characterized the OHA claim as

> grounded in the[ ]view that the "recognition in [the *Apology Resolution and Acts 354 and 359*] of the illegality of the transfer of [the ceded] lands and the ongoing reconciliation and negotiation process dramatically reinforces the State's fiduciary obligation to protect the corpus of the [p]ublic [l]and [t]rust until an appropriate settlement is reached."

OHA, 177 P.3d at 921 (alterations in original) (emphasis added). The decision makes clear that the lower court accepted the argument that the claim was based on factual findings in the *Apology Resolution* and, independently, on the identical findings in state statutes.

Because the Hawaii Supreme Court's decision rests on an independent interpretation of state law that adequately supports issuance of the injunction, this Court lacks jurisdiction to review the judgment.

III. THERE IS NO OTHER BASIS FOR THIS COURT TO ASSERT JURISDICTION OVER OHA'S STATE-LAW CLAIM.

On two grounds, the State argues that this Court can assert jurisdiction even if the Hawaii Supreme Court's judgment is founded on independent and adequate state law grounds. Pet'rs' Br. at 25 n.14; Reply Br. in Supp. of Cert. at 6-7. Both lack merit.

First, the State relies on a test articulated in *dictum* in a footnote in this Court's decision in *Florida* v. *Meyers*, 466 U.S. 380, 381 n.* (1984)—*dictum* this Court has not once relied upon in the 25 years since that decision issued. Pet'rs' Br. at 25 n.14; Reply Br. in Supp. of Cert. at 6-7.

In *Meyers*, this Court considered Florida's appeal of a state appellate court decision which had reversed the trial court's denial of a defendant's motion to suppress evidence seized from his vehicle and thus vacated the defendant's conviction. The defendant contested this Court's jurisdiction, claiming that the state appellate court had reversed on two grounds—a failure to suppress evidence, unlawful under federal law, and undue restrictions on cross-examination of the victim, unlawful under state law. The defendant asserted that this Court could not reverse the second holding that independently required vacatur of his conviction.

On review, this Court concluded that it was "highly questionable whether the District Court of Appeal would have reversed the conviction had it not reversed the trial court's ruling on the suppression motion." *Meyers*, 466 U.S. at 381 n.*. Accordingly, this Court found that the state court decision did not rest on the independent and adequate state ground of unlawfully restricted cross-examination. But this Court stated that it would have had jurisdiction to review the case "even if the cross-examination ruling did provide an independent state ground for reversal," *id.*, because the trial court would have been *required* to address the federal suppression issue again if the state court had ordered a new trial on the cross-examination issue. Therefore, this Court's "resolution of that issue w[ould] affect *the proceedings below* regardless of how the District Court of Appeal rule[d] on remand." *Id.* (emphasis added).

If this *dictum* is good law,[8] it avails the State nothing here. It applies only where this Court's decision of a federal issue would inevitably have an impact in proceedings below in the same case—proceedings that result from a remand based on an appellate reversal on an independent and adequate state ground. The State is not in this position. Because the Hawaii court also determined that state law recognized that native Hawaiians have unrelinquished claims over the ceded lands, there will not be any subsequent proceedings in which this Court's analysis of the *Apology Resolution* could have an effect.

The State nonetheless relies on *Meyers*, claiming that, "[i]f affirmed, the state court's interpretation of the *Apology Resolution* would . . . obstruct state-level efforts to restore the State's land-transfer authority."

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[8] *Amici* have discovered no case in which this Court has held that it has jurisdiction to review a state-court judgment notwithstanding an independent and adequate state ground for the state court decision. *Meyers* has been cited by this Court on only nine occasions since it was decided and never once for this proposition. *See Kansas* v. *Marsh*, 548 U.S. 163, 168 (2006); *Pennsylvania* v. *Bruder*, 488 U.S. 9, 13-14 (1988) (per curiam) (Stevens, J., dissenting); *Colorado* v. *Connelly*, 474 U.S. 1050 (1986) (mem. of Brennan, J.); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 375 n.12 (1985) (Stevens, J., dissenting); *United States* v. *Benchimol*, 471 U.S. 453, 458 (1985) (per curiam) (Brennan, J., dissenting); *United States* v. *Johns*, 469 U.S. 478, 488 (1985); *United States* v. *Sharpe*, 470 U.S. 675, 721 (1985) (Stevens, J., dissenting); *James* v. *Arizona*, 469 U.S. 990, 1000 (1984) (Brennan, J., dissenting); *Patton* v. *Yount*, 467 U.S. 1025, 1053 n.8 (1984) (Stevens, J., dissenting). As Justice Stevens, dissenting in *Meyers*, pointed out, the *Meyers dictum* represents a departure from the Court's jurisprudence on the independent and adequate state ground doctrine without so much as a citation to *Michigan* v. *Long*. *Meyers*, 466 U.S. at 384 n.1 (Stevens, J., dissenting).

Pet'rs' Br. at 25 n.14 (emphasis added). The State cites nothing in support of this proposition; nor could it find support. Nothing in the decision suggests that federal law would forbid the State to amend its Constitution, alter its laws, or otherwise use the political process to address the State's land-transfer authority. Moreover, any effect of the decision on "state-level efforts"—*i.e.*, the political process in the Hawaii State Legislature—would not create an Article III "case or controversy." See *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 102 (1998) ("We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."); see also *GTE Sylvania, Inc.* v. *Consumers Union of U.S., Inc.*, 445 U.S. 375, 382 (1980). *Meyers* does not salvage jurisdiction for the State here.

Second, the State now argues that "this Court has jurisdiction . . . because . . . the decision on review . . . affirmatively conflicts with the Newlands Resolution and related federal enactments in violation of the Supremacy Clause." Pet'rs' Br. at 24. This is essentially an argument that the Hawaii court should have held *sua sponte* that the state-law cause of action was preempted by federal law. This argument fails for several independent reasons.

Preliminarily, the question whether the Hawaii court's construction of state law conflicts with federal law was not raised in the petition for certiorari. It is the long-standing rule of this Court that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14(a); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645 (1992) ("[O]ur Rule 24.1(a) states that a brief on the merits should not 'raise additional questions or

change the substance of the questions already presented' in the petition." (quoting *Yee* v. *Escondidto*, 503 U.S. 519, 592 (1992))).

In the petition for certiorari, the State argued only that the Hawaii Supreme Court's interpretation of the *Apology Resolution* erroneously barred the State from conveying title to the ceded lands, contending that (1) the court's interpretation of the *Apology Resolution* conflicted with the *Resolution*'s express terms and (2) the Hawaii court's construction of the *Apology Resolution* was erroneous and would give rise to federalism concerns. See Pet. for Cert. at 11-15. The State did not argue that the decision conflicted with other federal laws, most notably the Newlands Resolution and the Organic Act, as it now contends. See Pet'rs' Br. at 24-25, 31-46. Neither of these federal provisions was even cited. This Court granted certiorari to address only "whether [the *Apology Resolution*] strips Hawaii of its sovereign authority to sell, exchange, or transfer [the ceded lands] . . . unless and until it reaches a political settlement with native Hawaiians about the status of that land." Pet. for Cert. at i.[9]

This Court should adhere to its usual practice and decline to address a question not fairly embraced by the question presented.[10] Indeed, the new issue in the "petitioner's brief . . . [is] improperly presented" because the issues in this appeal "are fixed by the petition." *Irvine* v. *California*, 347 U.S. 128, 129-30 (1954) (plurality opinion). "[I]t is neither fair to the

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[9] As discussed *supra* p. 14, the State's characterization of the federal question presented here misunderstands the decision of the Hawaii Supreme Court.

[10] The State also did not raise this question in the reply in support of the petition.

litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 159 (1999) (Stevens, J., concurring in part and dissenting in part).

If more reason were needed to decline to address this claim, *Amici* note that the State did not raise this question before the Hawaii court. "Ordinarily this Court does not decide questions not raised or resolved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see also *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 213 (1998).

The State did not make this waived argument of federal conflict until this Court's jurisdiction over the matter was disputed in OHA's brief in opposition to the State's petition, and it should be rejected for this reason alone.

CONCLUSION

For the reasons set forth in OHA's brief and above, the Court should dismiss this case for lack of jurisdiction.

Respectfully submitted,

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January 29, 2009

AMICUS CURIAE BRIEF

No. 07-1372

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF *AMICI CURIAE* OF EQUAL JUSTICE SOCIETY AND JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Equal Justice Society (EJS) is a national equal rights and social justice organization that aims to heighten public consciousness on race in the law and popular discourse. As heirs of the innovative legal and political strategists of *Brown v. Board of Education*, the organization broadly models its programmatic efforts after the late Honorable Constance Baker Motley and the Brown litigation team. Using a three-prong strategy of law and public policy advocacy, cross-disciplinary convenings and public communications, EJS seeks to restore race equity issues to the national consciousness, build effective progressive alliances, and advance the discourse on the positive role of government.

The Equal Justice Society has participated as *amicus curiae* before this Court in several cases, including *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Randall v. Sorrell*, 548 U.S. 230 (2006); and *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

EJS also has supported Native Hawaiian initiatives, including serving as *amicus curiae* before the Ninth Circuit Court of Appeals in *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (en banc), arguing that a Native Hawaiian educational program designed to repair continuing harms to Native Hawaiians does not transgress civil rights, but instead, benefits all people. EJS has engaged in national public education efforts about Native Hawaiian history, education, and self-governance.

The Japanese American Citizens League (JACL), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil rights organization with 113 chapters throughout the continental United States, Hawaii, and Japan. The JACL Honolulu Chapter is unique because it draws upon Hawaii's rich, multi-ethnic society and strong cultural values.

Since the 1940s, the JACL has been at the forefront of redress and reparation issues for individuals whose civil rights have been infringed. The JACL was instrumental in the passage of the Civil Liberties Act of 1988 (HR-442), which provided redress and an apology to those Japanese Americans who were denied their constitutional rights and incarcerated in internment camps during World War II for no reason other than their ethnicity. Subsequently, the JACL has supported numerous state redress and reparation programs, including Congress's Joint Resolution Acknowledging the 100th Anniversary of the January

17, 1893 Overthrow of the Kingdom of Hawaii. Further, the JACL has committed to and adopted Resolutions supporting Native Hawaiian reparations, sovereignty, self-determination and federal recognition at the JACL National Conventions in 1984, 1986, 1992, and 2000. Understanding the meaning and acknowledging the importance of redress and reconciliation set forth under state law, the JACL thus has an important and substantial interest in this case.

SUMMARY OF ARGUMENT

The three branches of Hawaii's government and its voting citizenry collectively have acknowledged the State's significant role in perpetuating historic injustice for Native Hawaiians, and they have committed the State to reparatory justice through reconciliation.

This commitment started in 1978, following a Constitutional Convention, when State voters overwhelmingly approved a constitutional amendment creating the Office of Hawaiian Affairs (OHA) for the purpose of representing Hawaiian people as beneficiaries of the Ceded Lands Trust. Those trust lands, originally taken by the United States following the "illegal overthrow" of the Hawaiian nation, had been transferred to the State upon statehood in 1959 partly for the benefit of Hawaiians.

The Hawaii legislature actualized the will of the populace in 1979. Implementing legislation identified

one of OHA's primary functions as serving "as a receptacle for reparations" for injustice. Subsequent legislation acknowledged the importance of Hawaiian self-determination as a response to historic harms, and it expressly committed the State to reconciliation. As part of that commitment, it initiated a process for some form of Hawaiian sovereignty, including the contemplated partial return of ceded lands to an entity representing the Hawaiian people.

The ceded lands hold unique cultural, spiritual and political significance for the Native Hawaiian people – they are not fungible or replaceable. Those lands, which belonged to the last Hawaiian monarch and the sovereign Hawaiian nation, were taken by the United States pursuant to annexation of Hawaii following what is now admitted to be the United States-aided "illegal overthrow" of the Hawaiian nation in 1893. The ceded lands were transferred to the State upon statehood in 1959, to be held in trust for, among other things, the betterment of living conditions for the Hawaiian people. Hawaii Statehood Admission Act (Admission Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). As recognized by the Hawaii Supreme Court, Hawaiians thus have both a unique attachment to and an unrelinquished claim to former Hawaiian lands, particularly the ceded lands. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 177 P.3d 884, 922, 926 (Haw. 2008) (OHA).

Hawaii's executive branch, through its current and former governors, reaffirmed the State's commitment

to reconciliation with Native Hawaiians. Hawaii's governor, in her 2003 State of the State address, by her administration's reparatory actions – including negotiating a settlement of ceded lands revenue long overdue to OHA – and by her administration's support for a form of Hawaiian self-governance and control over Hawaiian land and cultural resources, affirmed the State's commitment to settling Native Hawaiian claims to ceded lands.

In 2008, the Hawaii Supreme Court determined that the State's trust obligations extend to the State's commitment to reconciliation concerning the mutual resolution of Hawaiians' claims to ceded lands. The court cited this State reconciliation commitment as a primary legal basis for enjoining the State's sale of ceded lands until the State and a Hawaiian peoples' representative resolve Hawaiians' "unrelinquished claims" to those lands. *See OHA*, 177 P.3d at 903-05.

This State's reconciliation commitment to mutually resolve Hawaiian peoples' claims to ceded lands is thus rooted over time in all realms of state law: the Hawaii Constitution, multiple statutes, executive actions and the Hawaii Supreme Court's pronouncement. This State law commitment to reconciliation is a commitment to reparatory justice, and it entails a process of *recognition, responsibility, reconstruction* and *reparations*.

The State has *recognized* some of the harms, accepted *responsibility* for some of the damage and for taking reparatory action and supported at least one

form of *reconstruction* of Hawaiian governance. And in the context of *reparatory actions* that are integral to reconciliation, it also has committed to resolution of ceded lands claims with a representative of the Hawaiian people. But the State is now attempting to short-circuit the reconciliation process by reneging on this key reparatory aspect of its commitment.

As recognized by the Hawaii Supreme Court, the State's unilateral attempt to sell ceded lands undercuts the heart of the State's reconciliation commitment. It undermines the will of the Hawaii citizenry, the policies and dictates of the legislature and the governors' affirmations. And by reneging on a key aspect of the State's reconciliation commitment directly involving ceded lands, the State's sale of those trust lands would breach its trust obligation. That is the general state law claim OHA and the individual Native Hawaiians asserted in this case.

Indeed, the Hawaii Supreme Court determined that by unilaterally selling ceded lands to which Hawaiians have "unrelinquished claims" and which are central to the reconciliation process, the State would breach its trust obligation under state law, resulting in irreparable harm to indigenous Hawaiians. *OHA*, 177 P.3d at 922.

The Hawaii court's ruling now on appeal rested independently on state law. The court's breach of trust ruling embraced an evolving conception of state public trust law. It articulated the State's public trust obligation where a State commitment to reconciliation

encompasses mutual resolution of indigenous beneficiaries' historically-rooted unrelinquished claims to return of the unique trust res. This state law, specifically tailored to the historical context and present circumstances of this case, is adequate to sustain the court's judgment. This Court, therefore, lacks federal question jurisdiction over the appeal. 28 U.S.C. § 1257. Alternatively, if it determines that jurisdiction exists, this Court can affirm the Hawaii court's judgment on the basis of state law. *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983).

ARGUMENT

I. THE STATE OF HAWAII HAS A TRUST OBLIGATION NOT TO UNILATERALLY SELL CEDED LANDS BECAUSE THE STATE'S COMMITMENT TO RECONCILIATION REQUIRES MUTUAL RESOLUTION OF UNRELINQUISHED HAWAIIAN CLAIMS TO THOSE PUBLIC TRUST LANDS.

A. Through Its Constitution, Legislature, Governor and Judiciary, the State Committed to Reconcile with the Hawaiian People and Thereby to Repair Present-day Damage From Historic Injustice.

The State of Hawaii – through its voting populace, legislature, executive and judiciary – acknowledged its role in perpetuating historic harms against Native Hawaiians and committed itself to reparatory

justice through reconciliation. The State made this profound commitment through law because, in the words of one legislator, "[t]he injustice perpetrated on the Hawaiian people a century ago has been a cancer that insidiously and all too silently has been destroying the fabric of our community." Discussion on Conf. Comm. Rep. No. 97 and S.B. No. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 House Journal, at 791 (statement of Rep. Okamura). If the people of Hawaii "deny the rights of our indigenous people, we undermine the integrity of our entire society. . . . Unless we move toward achieving that goal [of self-determination and healing] . . . [w]e will remain blocked by a hundred years of anger and frustration." *Id.* at 792.

Initiating the commitment to reconciliation, Hawaii's people overwhelmingly ratified a 1978 amendment to the state constitution, creating the Office of Hawaiian Affairs. This new organization – formed partly to rectify the legacies of U.S. colonialism[2] by affording Hawaii's indigenous peoples a

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[2] The United States annexed Hawaii as a territory, against the protest of the former government and most of the adult Hawaiian populace, in 1898. *See* Noenoe K. Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (2004). That same year the United States acquired the Philippines, Puerto Rico, Cuba and Guam. *See* Stephen Kinzer, *Overthrow: America's Century of Regime Change from Hawaii to Iraq* (2006). The first United Nations list of non-self-governing territories eligible for de-colonization included Hawaii. Transmission of Information under Article 73e of the Charter, G.A. Res. 66(I), at 125, U.N. Doc. A/64/Add. 1 (Dec. 14, 1946).

measure of self-determination – was created as a semi-autonomous government agency to administer ceded lands trust resources for the betterment of indigenous Hawaiian life. *See* Haw. Const. art. XII, §§ 5 and 6; Haw. Rev. Stat. § 10-3(6) (Supp. 2007).

In crafting the constitutional amendment creating OHA, the Constitutional Convention delegates expressly recognized the injustices suffered by Hawaiians over the last century and determined that it was "well past time" for the State to "meet the obligation that we have to do justice" for the Native Hawaiian people. *See* Debates in Comm. of the Whole on Hawaiian Affairs, Comm. Prop. No. 13, in 1978 Proceedings of the Constitutional Convention of Hawaii, Vol. 2, at 460 (statement of Delegate Barr). *See also id.* at 457, 458 ("[T]he Hawaiian had become . . . land-less" and the creation of OHA would "address the modern-day problems of Hawaiians which are rooted in as dark and sad a history as will ever mark the annals of time.") (statement of Delegate De Soto).

Anticipating the reconstruction of Hawaiian self-governance and ensuing reparations, the Convention's Committee on Hawaiian Affairs expressly envisioned OHA as a "receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians[.]" Stand. Comm. Rep. No. 59, *reprinted in* 1978 Proceedings of the Constitutional Convention of Hawaii, Vol. 1, at 644. The Convention viewed the creation of OHA "of utmost importance" because it "provide[d] for accountability, self-determination, [and] methods for self-sufficiency

through assets and a land base[.]" *Id.* at 646. Specifically, OHA's Board of Trustees would have "the power to accept the transfer of reparations moneys and land." *Id.* at 645. OHA thus was created not only as a representative to receive income from trust lands but also as a vehicle for reparatory action.[3]

In 1979, the Hawaii legislature actualized the will of the populace through Act 196. That Act implemented the 1978 Constitutional amendment by creating OHA the organization, and thus reaffirmed the State's "solemn trust obligation and responsibility to [N]ative Hawaiians[.]" Act Relating to an Office on Hawaiian Affairs, 1979 Haw. Sess. L. Act 196, § 2. Significantly, in order to better conditions for Hawaiians, the Act expressly identified one of OHA's primary functions as serving "as a receptacle for reparations" for injustice. Haw. Rev. Stat. § 10-3(6).

Subsequent legislation acknowledged the importance of Hawaiian self-determination as a response to historic harms, and it expressly acknowledged the State's commitment to reconciliation. Act 329, "Relating to the Public Land Trust," highlighted the State's

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[3] Delegate Waihe'e, who later became the State's governor, explained that passage of Committee Proposal No. 13 did not immediately transfer title of ceded lands to Native Hawaiians, but instead recognized the need for reparations and anticipated the power of OHA to accept the transfer of reparations moneys and lands in the future. *See* Debates in Comm. of the Whole on Hawaiian Affairs, Comm. Prop. No. 13, *reprinted in* 1978 Proceedings of the Constitutional Convention of Hawaii, Vol. 2, at 462.

collective commitment to "permanent reconciliation" with Native Hawaiians in order to achieve a "comprehensive, just, and lasting resolution" of Hawaiian justice claims.

> The people of Hawaii, through amendments to their state constitution, the acts of their legislature, and other means, *have moved substantially toward* [ ] *permanent reconciliation.* Foremost among these achievements have been the creation of the [O]ffice of Hawaiian [A]ffairs and the allocation by legislative action to the [O]ffice of Hawaiian [A]ffairs of substantial funds out of a portion of the public land[s] trust established by section 5(f) of the Admission Act. The *overriding purpose of this Act is to continue this momentum, through further executive and legislative action* in conjunction with the people of Hawaii, *toward a comprehensive, just, and lasting resolution.*

1997 Haw. Sess. L. Act 329, § 1.

The legislature also determined that reconciliation "so desired by all people of Hawaii" could only be successful if the State recognized past injustice and accepted responsibility for repairing persisting damage:

> The legislature finds that the events of history relating to Hawaii and Native Hawaiians, including those set forth in [the Apology Resolution] continue to contribute today to a deep sense of injustice among many Native

> Hawaiians and others. The legislature *recognizes that the lasting reconciliation so desired by all people of Hawaii is possible only if it fairly acknowledges the past while moving into Hawaii's future.*

Id.[4]

Acting upon the State's reconciliation commitment, the legislature initiated a process for a form of Hawaiian sovereignty that encompassed "repossession of their land." It sought to "*redress*[ ] *the wrongs* and inequities resulting from the overthrow of the Hawaiian Kingdom and *usurpation of the government, lands,* and treasury of the indigenous Hawaiian people . . . *through* empowerment of [Hawaiians'] self-determined institutions and *repossession of their land*, ocean, water, and financial resources." Conf. Comm. Rep. No. 97 on S.B. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 Senate Journal, at 782 (emphasis added).[5] The Act facilitated "healing a hundred

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[4] The Hawaii legislature also "pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. L. Act 354, § 1.

[5] Act 359 created a Hawaiian Sovereignty Advisory Commission to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. L. Act 359, § 2. The Hawaii legislature "recognize[d] and affirm[ed] the inherent right of the indigenous Hawaiian people . . . to establish a sovereign government with powers, duties, and land, ocean, water, and financial resources[.]" Conf. Comm. Rep. No.

(Continued on following page)

years of mistrust and abuse." Discussion on Conf. Comm. Rep. No. 97 and S.B. No. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 House Journal, at 791 (statement of Rep. Okamura).

The federal Apology Resolution of 1993 expressly acknowledged and commended these "efforts of reconciliation initiated by the State of Hawaii . . . with Native Hawaiians[.]" Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii (Apology Resolution), Pub. L. No. 103-150, § 1, 107 Stat. 1513 (1993).

B. The Resolution of Hawaiian Peoples' Claims to Ceded Lands Is Central to the State's Reconciliation Commitment.

This commitment to reconciliation for the benefit of all Hawaii's people aimed to repair the persisting damage of historic injustice, and it envisioned specific reparatory acts – including the partial return of ceded lands to a Native Hawaiian entity. In 1993, the Hawaii legislature found that "[m]any native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made[.]" Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. L. Act 354, § 1.

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97 on S.B. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 Senate Journal, at 782.

The ceded lands hold unique cultural, spiritual and political significance for the Hawaiian people – they are not fungible or replaceable. *See Pele Defense Fund v. Paty*, 837 P.2d 1247, 1269 (Haw. 1992) (recognizing Hawaiians' special cultural and spiritual connection to ceded lands). Those lands, which belonged to the last Hawaiian monarch and the sovereign Hawaiian nation, were taken by the United States pursuant to annexation of Hawaii following what is now admitted to be the United States-aided "illegal overthrow" of the Hawaiian nation in 1893. Apology Resolution § 1, 107 Stat. 1513; 1993 Haw. H.R. Con. Res. No. 179. The ceded lands were transferred to the State upon statehood in 1959, to be held in trust for, among other things, the betterment of living conditions for the Hawaiian people. Admission Act, § 5(f), 73 Stat. 6. As recognized by the Hawaii Supreme Court, Hawaiians thus have both a unique attachment and unrelinquished claims to former Hawaiian lands, particularly the ceded lands. *OHA*, 177 P.3d at 922, 926.

In 1997, through Act 329, the legislature clarified "the proper management and disposition of the lands subject to the public land[s] trust and the proceeds and income therefrom . . . to effectuate article XII, section 6 of the Hawaii Constitution." 1997 Haw. Sess. L. Act 329, § 1. Its express language identified the State's paramount goal of moving "toward a comprehensive, just, and lasting resolution" of Hawaiian claims to the ceded lands. *Id.*

To achieve this "comprehensive, just, and lasting resolution" of Hawaiians' ceded lands claims, the Act created "an open process to study and make recommendations on issues relating to the public land trust, *including whether land should be transferred to the Office of Hawaiian Affairs in partial or full satisfaction of obligations under Article 12, Section 6, of the Hawaii Constitution.*" Conf. Comm. Rep. No. 116 on H.B. 2207, 19th Leg., Reg. Sess., *reprinted in* 1997 Senate Journal, at 781 (statement of Senator Solomon) (emphasis added). The Senate Ways and Means Committee also highlighted the legislature's intention to return a portion of the ceded lands to a Hawaiian entity to satisfy the State's legal obligations.

> A joint committee is being appointed to study and make recommendations on the transfer of lands to the Office of Hawaiian Affairs. . . . The committee will conduct public hearings to *facilitate discussions on* the criteria for selection and *the process of selection and transfer of portions of the public land trust to the Office of Hawaiian Affairs to satisfy all or a portion of the State's obligations under the Admissions Act and the State Constitution.*

S. Ways and Means Comm. on H.B. 2207, Stand. Comm. Rep. No. 1482, 19th Leg., Reg. Sess., *reprinted in* 1997 Senate Journal, at 1454 (emphasis added).

Equally significant, the Senate committee handling all aspects of land and Hawaiian affairs acknowledged the historic injustices, and it recognized the centrality of Hawaiian claims to ceded lands to

the process of reparatory justice. Specifically, the Senate Committee on Water, Land, and Hawaiian Affairs intended that the legislation "*establish the process by which to finally and justly resolve* the longstanding issues over the *State's responsibilities toward the Hawaiian people and managing the public [ceded] land and the Hawaiian home lands trusts.*" S. Water, Land, and Hawaiian Affairs on H.B. No. 2207, Stand. Comm. Rep. No. 1118, 19th Leg., Reg. Sess., *reprinted in* 1997 Senate Journal, at 1315-16 (emphasis added). The deliberative "mutually inclusive" process envisioned was reconciliation – a process that would "elevate the discussions over OHA's entitlements to a level where sensitivity over the past injustices toward the Hawaiian people and collaboration over resolving the longstanding responsibilities bestowed upon the State in its Admission Act and State Constitution [concerning public lands trusts] prevails." *Id.* at 1316.

> [O]ne hundred-four years is a long time to wait for justice . . . the State should not rush into settling a part of history that many much rather forget. Rather . . . *justice requires that a thoughtful, comprehensive, and mutually-inclusive process be established in order to arrive at a compassionate and fair resolution* [of Hawaiian land trust claims]. It is only through this process, however painful and laborious, that we will truly learn the price of our State's existence."

Id. at 1315.

This State commitment to reconciliation, encompassing the partial return of ceded lands, is also demonstrated by legislation establishing the island of Kahoʻolawe as a public land trust. That legislation also mandated that the State transfer control of Kahoʻolawe to a sovereign Native Hawaiian entity upon its recognition by the United States and the State of Hawaii. Haw. Rev. Stat. § 6K-9 (1993). "Upon . . . return [of Kahoʻolawe] to the State, the resources and waters of Kahoʻolawe shall be held in trust as part of the public lands trust; provided that the State *shall transfer* management and *control of the island and its waters to the sovereign native Hawaiian entity upon its recognition* by the United States and the State of Hawaii." Act Relating to the Island of Kahoʻolawe, 1993 Haw. Sess. L. Act 340, § 2.

Hawaii's executive branch, through its current and former governors, reaffirmed the State's commitment to reconciliation with Native Hawaiians. Hawaii's governor, in her 2003 State of the State address, by her administration's reparatory actions – including negotiating a settlement of ceded lands revenue long past due to OHA[6]

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[6] The Attorney General and OHA negotiated for four years and agreed upon a settlement seeking to resolve a 30-year dispute over revenue from ceded lands that would give OHA three parcels of land, $13 million and a minimum of $15.1 million per year in exchange for OHA's agreement to waive further back claims to ceded lands income (but not to the transfer of ceded lands). The 2008 State Senate failed to approve the settlement. *See* Treena Shapiro, *Ceded Lands Settlement Bill Killed in Senate*, Hon. Adv., Mar. 18, 2008.

– and by her administration's support for a form of Hawaiian self-governance and control over Hawaiian lands and cultural resources, committed to settling Native Hawaiian claims over ceded lands.[7] *See CHA*, 177 P.3d at 923. Prior governors made similar commitments. *See* Office of the Governor, *An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust*, Jan. 1991, at 2 ("[t]he prevailing philosophy of this proposal is that proactive actions are needed to remedy historic controversies if the State is to successfully fulfill its current and future obligations under both trusts.").[8]

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[7] "On January 21, 2003, in her 'State of the State Address,' Governor Lingle stated, 'Here at home in Hawai'i[,] I will continue to work with you [*i.e.*, the members of the legislature] and with the Hawaiian community to resolve the ceded lands issue once and for all.'" *OHA*, 177 P.3d at 923 (quoting Linda Lingle, Governor, State of Hawai'i, *State of the State Address: An Outline of the Governor's Agenda* (Jan. 21, 2003)).

[8] Governor John Waihe'e's 1991 "Action Plan" set forth a proposal to resolve Hawaiian claims to the trusts "as the beginning of action towards resolution." *Action Plan*, at 3. In 1998, Governor Benjamin Cayetano pledged to "settle the ceded lands issue" before the end of his term. Benjamin J. Cayetano, *The Next Four Years: Completing the Vision*, Hon. Adv., Oct. 16, 1998, at A-13. Governor Linda Lingle stressed in 2003 that, "until we get [the ceded-lands issue] resolved[,] our community can never really come together as one." Governor Linda Lingle, *State of the State Address*, at 4. Governor Waihe'e, along with Hawaii's congressional delegation, also played a key role in the transfer of Kaho'olawe to the public trust. *See* Helen Altonn, *Waihee Signs Kahoolawe Bill*, Hon. Star. Bull, Jul. 1, 1993, at A-5.

C. The Hawaii Supreme Court Determined that the State's Trust Obligations Encompass Its Reconciliation Commitment to Mutual Resolution of Ceded Lands Claims.

In 2008, the Hawaii Supreme Court gave formal legal recognition to the State's reconciliation initiative – including the State's contemplated partial return of ceded lands to the Hawaiian people – as a primary legal basis for finding a State breach of trust and enjoining the State's sale of ceded lands until the State and a Hawaiian peoples' representative resolve Hawaiians' "unrelinquished claims" to those lands. The court recognized that "state legislation enacted at around or subsequent to the adoption of the Apology Resolution – specifically, Acts 354, 359, 329, and 340[,]" *OHA*, 177 P.3d at 903, informed the Resolution's call for reconciliation with the Native Hawaiian people, and thus "g[a]ve rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." *Id.* at 905.

The court acknowledged that with respect to ceded lands, "the state legislature itself has announced that future reconciliation between the State and native Hawaiians *will occur*." *Id.* at 923 (emphasis added). According to the court, through its multiple Acts, the legislature recognized that "the indigenous people of Hawai'i were denied . . . their lands," and contemplated further government action

to reach "lasting reconciliation so desired by all people of Hawaii." *Id.* (citing 1993 Haw. Sess. L. Act 359, § 1(9) at 1010 and 1997 Haw. Sess. L. Act 329, § 1 at 956).

Significantly, the Hawaii court determined that the State's trust obligations extend to the State's commitment to reconciliation concerning resolution of Hawaiians' claims to ceded lands. "Congress, the Hawai'i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever." *Id.* at 923.

In sum, the State's commitment to reconcile with Native Hawaiians, crucially encompassing ceded lands, constitutes a trust obligation deeply rooted in all realms of state law: the Hawaii Constitution (overwhelmingly ratified by Hawaii's voting citizenry), multiple statutes, executive affirmations and the Hawaii Supreme Court's pronouncement.

II. THE STATE WOULD BREACH ITS TRUST OBLIGATION BY RENEGING ON A KEY REPARATORY ASPECT OF ITS RECONCILIATION COMMITMENT TO MUTUALLY RESOLVE HAWAIIAN CLAIMS TO CEDED LANDS.

A. A Commitment to Reconciliation Is a Commitment to a Process of Reparatory Action.

The state law question thus arises: With a state constitutional foundation and legislative mandate affirmed by the state Supreme Court, what are the State's reconciliation obligations, particularly concerning ceded lands?

Clearly, in this unique case, state laws collectively do far more than announce general policy. Rather, they legally commit the State to a process of reconciliation with Native Hawaiians. Although the legislature did not detail the specifics of the reconciliation process, the Hawaii Supreme Court's general pronouncements, in the context of global reconciliation initiatives and the growing field of reconciliation theory, provide insight into the court's thinking about the State's obligations.

Globally, reconciliation initiatives proliferate. Created by law, they have become a primary vehicle for established democracies to repair the persisting

damage of historic injustice[9] – including the systemic harms to indigenous peoples. William C. Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 Am. Indian L. Rev. 1 (2002-2003). While these initiatives are mainly undertaken by national governments, some are advanced by state or local governments.[10] Formal reconciliation initiatives have also mushroomed in

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[9] *See generally* Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. Toronto J.L. 253 (2002) (Canada); Pamela O'Connor, *Reparations for Australia's Removed Aboriginal Children: Defining the Wrong, in Third World Legal Studies Journal, Special Issue on Reconstruction and Reparations in International Law* (2000-2003) (Australia); Joe Williams, *Truth, Reconciliation and the Clash of Cultures in the Waitangi Tribunal*, Austl. & N.Z. Law and History E-Journal (2005) (Britain-New Zealand); Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 Asian-Pac. L. & Pol'y J. 23 (2002) (Japan); Eric K. Yamamoto and Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 Asian Am. L.J. (forthcoming Spring 2009) (United States and Japan).

[10] For example, state and territorial governments in Australia committed to reconciliation with Australia's aboriginal people, and the national government created the Council for Aboriginal Reconciliation and established a local government accountability regime. Council for Aboriginal Reconciliation Act of 1991, 1991 (Austl.); *Reconciliation: Australia's Challenge*, Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament (Dec. 2000).

emerging democracies transitioning from repressive regimes.[11]

One commonality among these varying reconciliation efforts is that they are undertaken to establish or enhance a government's stature as a democracy committed to civil and human rights through reparatory justice. Eric K. Yamamoto, et al., *American Reparations Theory and Practice at the Crossroads*, 44 Cal. West. L. Rev. 1 (2007); Bradford, *supra*. A second commonality is the belief that reconciliation can be a win-win process if all engage in good faith – healing the wounds of those injured while lessening social divisions, guilt and mistrust and rebuilding community for the benefit of all. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. Rev. 323, 397 (1987).

A third commonality is that these reparatory initiatives are not mere expressions of hope or general policy. The initiatives are authorized by law and reflect a commitment to social healing through the rule of law. Hlengiwe Mkhize, *Introductory Notes to the Presentation of the Truth and Reconciliation Commission's Proposed Reparation and Rehabilitation Policies, in When Sorry Isn't Enough* 501-02 (Roy

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[11] *See The Handbook of Reparations* 3-4 (Pablo de Greiff ed., 2006) (reparations/reconciliation initiatives in the transitioning democracies in Argentina, Chile, Brazil, El Salvador, South Africa and Malawi).

L. Brooks ed., 1999) ("The legal basis for reparations [is the legislative Act] . . . which gives us our mandate . . . to provide for the 'taking of measures aimed at the granting of reparations to, and the rehabilitation and the restoration of the human and civil dignity.'"); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1989) (1988) (Japanese American internment redress, encompassing acknowledgments, an apology, reparations and public education).

While reconciliation laws often do not specify the particular outcomes of the process, they do mandate that a government affirmatively engage in both words and actions – so that the government's commitment does not dissolve into words alone and an attempt at achieving "cheap grace." Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* 194-195 (2000). Some reconciliation laws do detail specific claims for resolution – for instance, the Hawaii Constitution and legislation expressly identify resolution of Hawaiian claims to ceded lands as part of the reconciliation process. *See* 1997 Haw. Sess. L. Act 329, § 1.

A fourth commonality is that although there is no set formulation, this law-created and -guided reconciliation process constitutes a commitment to reparatory justice, and it generally encompasses stages or dimensions. Those stages or dimensions, which are integral to genuine reconciliation, are *recognition, responsibility, reconstruction* and *reparations*. Yamamoto, *Interracial Justice*, *supra*, at 172. This multi-dimensional process

is grounded in many disciplines, including theology, social psychology, history, economics, law, sociology, political theory and indigenous healing practices.[12] And it is employed in varying ways by governments engaged in redress efforts throughout the world. *See* Brief of *Amici Curiae* Asian American Justice Center, et al. in Support of Respondent, in *State v. Office of Hawaiian Affairs*, No. 07-1372 (describing global sweep of reconciliation initiatives responding to historic injustices that include acknowledgments and apologies).

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[12] *See, e.g.*, John Dawson, *Healing America's Wounds* (1994) (theology); Donald W. Shriver, *An Ethic for Enemies: Forgiveness in Politics* (1995) (theology and political theory); Elizar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000) (history and cultural studies); Harlon Dalton, *Racial Healing* (1995) (critical race theory); Rebecca Tsosie, *Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 Mich. J. Race & L. 21 (2005) (Native American law); Judith Lewis Herman, *Trauma and Recovery* (1992) (social psychology); Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (2004) (law and theology); *When Sorry Isn't Enough: The Controversy Over Apology and Reparations* (Roy L. Brooks ed. 1999) (law); Alfred Brophy, *Reparations Pro & Con* (2006) (law); Emma Coleman Jordan & Angela P. Harris, *Economic Justice* (2005) (economics); *Pacific Indigenous Dialogue: on Faith, Peace, Reconciliation and Good Governance* (Tui Atua Tupua Tamasese Taisi Efi, et al. eds., 2007) (Pacific indigenous people's peacemaking and reconciliation); Eric K. Yamamoto: *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (2000) (coalescing multidisciplinary insights into social healing through reconciliation).

More specifically, *recognition* acknowledges ways in which individuals, because of their group identity, continue to suffer pain, fear, shame and anger. It also looks at a grievance's history and decodes stock stories embodying cultural stereotypes that seemingly legitimate injustice. And it examines the ways that institutional structures embody discriminatory or exclusionary policies that deny fair access to jobs, housing and education or promote aggression and the denial of self-determination. Eric K. Yamamoto and Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 Asian Am. L.J. (forthcoming spring 2009); Pablo de Greiff, *Justice and Reparations*, *in The Handbook of Reparations* 460 (Pablo de Greiff ed., 2006); Jonathan R. Cohen, *Coping With Lasting Social Injustice*, 13 Wash. & Lee J. Civ. Rts. and Soc. Just. 259 (2007).

Responsibility entails an assessment of "power over" others and an acceptance of responsibility for repairing the damage of "disabling constraints" imposed on others through power abuses. It reflects a duty to heal group-based wounds, whether grounded in personal culpability, receipt of privileges and benefits, or a simple need to rebuild community. Yamamoto, *Interracial Justice*, *supra*, at 185-190; Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 Colum. L. Rev. 973 (2002).

Reconstruction aims to build a new productive relationship. It includes apologies and other acts of atonement (if appropriate), a joint re-framing of history of interactions and, most important, the reallocation of political and economic power. Yamamoto & Obrey, *supra*; Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. Rev. 1419 (2007). The power restructuring aims to remake institutions to assure non-repetition of the underlying abuses through "legislative or other reforms affecting the state's social, legal or political institutions and policies." Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past, in The Handbook of Reparations*, at 526-527.

Finally, *reparations* include money but encompass much more (potentially including restoration of property, rebuilding culture and economic development, as well as educational and financial support for individuals and communities in need). In other words, reparations often encompass restitution, rehabilitation and monetary payments. *See* Carrillo, *supra*, at 512; Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006). In addition, public education can be an integral component of reparations, whether in the

form of memorials, school curricula, media presentations or scholarly publications.

In most situations, in order to heal social wounds, policymakers, groups and the general populace collectively need to fully engage all of these "Four Rs." Otherwise, even the most sincere healing efforts will likely be experienced as incomplete and insufficient and ultimately judged a failure. Yamamoto, *Interracial Justice*, *supra*, at 162.

The Hawaii Supreme Court has not expressly embraced a particular framework of reconciliation. Nevertheless, its choice of reconciliation language in describing the State's commitment indicates resonance with the foregoing approach.[13] According to this

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[13] The Hawaii Supreme Court generally endorsed the reconciliation approaches contemplated by both the State and Federal governments, encompassing the dimensions of recognition, responsibility, reconstruction and reparatory action. The court first highlighted the importance of governmental *recognition* of past injustices and the acceptance of *responsibility* for repair. It "believe[d] Congress has *clearly recognized* that the native Hawaiian people have unrelinquished claims over the ceded lands which were taken without consent or compensation[.]" 177 P.3d at 901 (citing Pub.L. No. 103-150, 107 Stat. 1510) (emphasis added). "Equally clear" for the court was "Congress's 'express[ed] . . . commitment to *acknowledge* the ramifications of the overthrow of the Kingdom of Hawaii, in order to *provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people.'" *Id.* at 901-02 (quoting Pub.L. No. 103-150, 107 Stat. 1510). The Hawaii court also highlighted the importance of the State's acknowledgment of harms to Hawaiians: "'The legislature recognizes that the *lasting reconciliation* so desired by all people of Hawai'i

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is possible only if it *fairly acknowledges the past* while moving into Hawaii's future.'" *Id.* at 904 (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956).

The Hawaii court also cited federal and state enactments highlighting the dimensions of *reconstruction* and future *reparatory action*. It referred specifically to the federal *From Mauka to Makai* report in which the Departments of the Interior and Justice acknowledged *responsibility* for repair and recommended further *reconstruction* and *reparation*: "'For generations, the United States has *recognized the rights and promoted the welfare* of [n]ative Hawaiians as an indigenous people within our nation through legislation, administrative action, and policy statements. To safeguard and enhance [n]ative Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should *enact further legislation* to clarify [n]ative Hawaiians' political status and to *create a framework for recognizing a government-to-government relationship* with a representative [n]ative Hawaiian governing body.'" *Id.* at 903 (quoting *From Mauka to Makai: The River of Justice Must Flow Freely: Report on the Reconciliation Process between the Federal Government and Native Hawaiians*, Oct. 23, 2000) (emphasis added). Some Hawaiian groups strongly support federal recognition, while others thoughtfully and forcefully argue that the governmental restructuring envisioned by the Departments and related legislation fail to provide the Hawaiian people with genuine independence. Gordon Y.K. Pang, *Hawaiian Independence Groups Send 'No' Message*, Hon. Adv., Jul. 1, 2005.

The court also emphasized the State's comprehensive commitment to *recognition*, *reconstruction* and *repair* through its legislative acts: "The [state] legislature '*acknowledged* that the actions by the United States were illegal and immoral, and *pledge[d] its continued support* to the native Hawaiian community by *taking steps to promote the restoration* of the rights and dignity of native Hawaiians.'" *Id.* (quoting 1993 Haw. Sess. L. Act 354, § 1 at 999-1000) (emphasis added). Moreover, as cited by the court, "'the people of Hawai'i through amendments to their state constitution, the acts of their legislature, and other

(Continued on following page)

approach, the State committed itself through law to a process encompassing recognition of past and present harms, acceptance of responsibility for repair and social healing, reconstruction of institutional relationships and reparatory action.

As the state legislature and judiciary have instructed, upon reconstruction of a new institutional relationship (through recognition of a self-governing representative of the Hawaiian people), one key aspect of the commitment to reparatory action is the resolution of Hawaiians' "unrelinquished claims" to ceded lands held in trust by the State. *OHA*, 177 P.3d at 922-23, 926; 1997 Haw. Sess. L. Act 329, § 1.

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means, have moved substantially toward this permanent reconciliation.'" *Id.* at 904 (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956). As the court emphasized, the State sought to "'continue this momentum, through *further executive and legislative action* in conjunction with the people of Hawaii,'" *id.*, "'toward a *comprehensive, just, and lasting resolution*' regarding native Hawaiian claims to the ceded lands." *Id.* at 923 (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956) (emphasis in original). The court recognized that the Hawaii legislature "'*contemplated further action* . . . to reach a 'lasting reconciliation so desired by all people of Hawaii.'" *Id.* (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956).

Thus, the court acknowledged that, without the opportunity for further *reparatory action*, the reconciliation between the State and Native Hawaiians would falter: "Without an injunction, the ceded lands are at risk of being alienated and . . . once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians and will . . . undoubtedly have a negative impact on the contemplated reconciliation efforts." *Id.* at 922.

As an integral part of reconciliation, the State's reparatory action obligation does not preordain the ultimate resolution of those ceded lands claims. But it does impose upon the State the duty not to dispose of those trust lands at the heart of the ongoing reconciliation initiative before the State and a Hawaiian representative mutually resolve those claims. Indeed, as the Hawaii Supreme Court acknowledged, the federal Apology Resolution "and related state legislation give rise to *the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved*[ ]" as part of the reconciliation process. *OHA*, 177 P.3d at 922 (emphasis added).

B. By Unilaterally Selling Ceded Lands the State Would Renege on a Key Reparatory Aspect of Its Reconciliation Commitment to Mutually Resolve Hawaiians' Claims to Ceded Lands, and It Would Thereby Breach Its Trust Obligation.

The State – through its constitutional amendment, statutes and high court ruling – "recognized" the historic injustice and persisting harms, accepted at least partial "responsibility" for repair and supported the beginnings of "reconstruction" (through its own sovereignty initiative and its support for federal self-governance legislation). Most important, OHA, as

current representative of Hawaiian people and authorized "receptacle for reparations," and the State commenced the legislatively-directed process of reparatory action in part by focusing on Hawaiian claims for ceded lands income payments and for return of a portion of the trust lands themselves.[14]

But the State is now attempting to short-circuit this key aspect of that process. As recognized by the Hawaii Supreme Court, the State's unilateral attempt to alienate ceded lands undercut the State's reconciliation commitment to reparatory action. *See OHA*, 177 P.3d at 922, 926. And in doing so it transgressed the

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[14] In other areas, the State has engaged in some form of *recognition, responsibility, reconstruction* and *repair* of historic harms to Native Hawaiians. For example, after years of illegal and uncompensated State use of lands in the Hawaiian Homelands trust, Hawaii's Governor George Ariyoshi cancelled Executive Orders that had improperly withdrawn Homelands from the trust inventory. *See* Action Plan, *supra*, at 35. After litigation and successful lobbying, in 1995, the Hawaii legislature passed and the Governor approved Act 14, which committed the State to pay $30 million a year for 20 years, $600 million total, to the Hawaiian Homelands Trust. *See* Act Relating to Hawaiian Home Lands 1995 Haw. Sess. L. Act 14, § 6. *See also* Haw. Const. art. XII, § 7 (protecting traditional and customary Native Hawaiian rights); Haw. Const. art. X, § 4 (mandating that the State "promote the study of Hawaiian culture, history and language . . . [and] provide for a Hawaiian education program consisting of language, culture and history in the public schools"); Haw. Rev. Stat. § 6E-43 (1993) (establishing a process for preservation of Native Hawaiian burial sites); Hawaii Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads* 23 (June 2001) (identifying State programs designed to assist Native Hawaiians).

will of Hawaii's citizenry, the policies and dictates of the State's legislature and the affirmations of its governors that the State and a representative of the Hawaiian people mutually resolve Hawaiians' "unrelinquished claims" to ceded lands as an integral part of the reconciliation process. *See supra*, Section I.

On the precipice of reneging on a key aspect of the State's reconciliation commitment through its attempted sale of ceded lands – challenged here by OHA and individual trust beneficiaries – the State was poised to breach its trust obligation. As the Hawaii court determined, "any future transfer of ceded lands by the State would be a breach of the State's fiduciary duty to preserve the trust res." *OHA*, 177 P.3d at 922.

By ascertaining and applying state law on reconciliation, as it relates to public trust lands, the Hawaii Supreme Court did not dictate how the State and the Hawaiian people will resolve the claim to ceded lands. But it did preserve the heart of that claim – the possibility of return of the actual ceded lands taken by the United States as a result of the admittedly "illegal overthrow" of the Hawaiian nation and now held in trust by the State – until the claim is mutually resolved. *See id.* at 927.

In light of the State's commitment to reconciliation and impending state law breach of trust, the Hawaii court properly ordered injunctive relief to allow the "state legislature a 'reasonable opportunity to craft and enforce,' . . . relevant laws consistent with

the congressional and legislative calls for reconciliation and settlement of native Hawaiian [ceded lands] claims." *Id.* at 918 (citation omitted).

III. THE HAWAII SUPREME COURT'S INJUNCTION ORDER CAN AND THEREFORE SHOULD BE AFFIRMED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

The Hawaii Supreme Court's decision now on appeal rested independently on state law. The court's breach of trust ruling embraced an evolving conception of state public trust law. *Id.* at 905 (quoting *Ahuna v. Dep't of Hawaiian Homelands*, 640 P.2d 1161, 1170 (Haw. 1982) regarding the State's "obligation to use reasonable skill and care to make trust property productive"). The court articulated the State's public trust obligation where a State commitment to reconciliation encompasses mutual resolution of beneficiaries' historically-rooted unrelinquished claims to return of the unique trust res. This state law, specifically tailored to the historical context and present circumstances of this case, is adequate to sustain the Hawaii court's judgment. This Court, therefore, lacks federal question jurisdiction over the appeal. 28 U.S.C. § 1257. Alternatively, if it determines that jurisdiction exists, this Court can affirm the Hawaii Supreme Court's judgment on the basis of state law. *See Long*, 463 U.S. at 1040-42.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to dismiss the petition, or in the alternative, affirm the judgment of the Hawaii Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-1372

Supreme Court, U.S.
FILED
DEC 11 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Hawaii

AMICI CURIAE BRIEF OF GRASSROOT INSTITUTE OF HAWAII AND SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

(EXCEPT THAT THEY ASK TOO LITTLE AND DO NOT ADDRESS THE REAL ISSUE)

INTERESTS OF *AMICI CURIAE*[1]

Grassroot Institute of Hawaii ("GRIH") is a non-profit, free-market public policy institute advocating liberty, responsible and open government, and the rights of the individual. It is an affiliate of State Policy Network and more than 80 similar state think tanks and institutes across America and Europe. Through research papers, policy briefings, commentaries and conferences, GRIH seeks to educate and inform Hawaii's policymakers, news media and the general public on the important issues of our time.

This case deals with the gravest threat to the State of Hawaii in its history. GRIH believes the January 31, 2008 decision of the Hawaii Supreme Court, the 1993 Apology Resolution on which it is based, and the Akaka bill which it would enable, have brought the State of Hawaii to the brink of self-destruction. On March 7, 2008 GRIH advised the

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[1] Blanket consents of the parties to the filing of *amicus curiae* briefs are on file with the Office of the Clerk of this Court. The Petitioners' consent was filed November 6, and the Respondents' December 1, 2008.

No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Honorable Linda Lingle of its concerns and asked her as Governor to take appropriate action on behalf of all the people of Hawaii. GRIH's concerns were that the State Attorney General had not contested the misstatements of history in the Apology resolution; and did not raise the constitutional and trust law defenses to the Office of Hawaiian Affair's ("OHA's") claims.[2]

Southeastern Legal Foundation, Inc. ("SLF"), founded in 1976, is a national public interest law firm and policy center that advocates constitutional individual liberties, free enterprise and private property rights in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States. SLF shares the grave concerns of GRIH and its call for action by this Court.

Hawaii is justly admired as an integrated, racially blended society. It has been called a model for the rest of the country, perhaps for the world. But some people in Hawaii find no comfort in integration and equality. For over two decades, a counter-current promoting special privileges for persons of Hawaiian ancestry has gradually developed and, to some extent become the accepted norm among those in Hawaii with a vested interest in continuing such racial

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[2] The correspondence is posted at http://www.aloha4all.org/news.aspx.

distinctions between citizens. This case is just a glimpse of the internal forces working to destroy the ideals of aloha and equal opportunity for every individual whatever his or her ancestry, embraced by the founding fathers of both the Kingdom of Hawaii (Kamehameha I, II and III) and the United States of America.[3]

These *Amici* support the Petitioners-Defendants-Appellants HCDCH and its director and board members; the State of Hawaii; and the Honorable Linda Lingle, Governor of the State of Hawaii (collectively "State Parties") except that State Parties ask too little and do not address the real issue.

Pursuant to Supreme Court Rule 37(1) these *Amici* bring to the attention of the Court the following "relevant matters not already brought to its attention by the parties."

SUMMARY OF ARGUMENT

The Apology resolution and its "whereas" clauses are incorrect, of no probative value, and have no legal force or effect whatsoever.

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[3] See for example two *Grassroot Institute of Hawaii* research papers:

Race to Racism? Ascribe it to Tribe by Paul M. Sullivan, Esq. 3/21/2003, http://www.hawaiireporter.com/story.aspx?ab166d66-d042-4561-9276-b6577961accd; *Hawaii Divided Against Itself Cannot Stand* by Bruce Fein, Esq. June 1, 2005, http://tinyurl.com/7d6xq.

Under *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819) and Restatement (Third) of Trusts §64 (2003) neither the State of Hawaii nor the United States have authority to modify the terms of the Ceded Lands Trust. Hawaii Constitution, Article XII §§4, 5 and 6 and HRS §10-13.3 and all other state laws purporting to give Hawaiians or Native Hawaiians any right, title or interest in the Ceded Lands Trust not given equally to other beneficiaries are unconstitutional and void.

OHA and its use of ceded lands funds or property solely for race-based purposes is unconstitutional.

ARGUMENT

1. The State Parties ask too little.

While commendably seeking review and reversal of the January 31, 2008 decision of the Hawaii Supreme Court, the State Parties ask only if Congress's "symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land" unless and until the State has made a deal with native Hawaiians.

By presenting only that question, the State Parties would reduce this case to nothing more than a turf war, an intra-government squabble over which State politicians, the Governor and other executive branch officials or the OHA Trustees, both courting the Native Hawaiian voting bloc and the well-financed

interests that serve it, are in charge of doling out the benefits of, and divvying up, the ceded lands.

Reversing the Hawaii court's judgment simply because the Apology resolution does not actually "dictate" issuance of an injunction, would provide only fleeting, if any, relief. The Hawaii Legislature could enact even more race-based legislation such as a veto-proof moratorium on land transfers; or it could approve an agreement similar to the $200M "settlement"/giveaway proposed by the Governor and OHA in January of this year. www.oha.org/kawaiola/2008/2. Even if such legislation would be ultimately invalidated, it is uncertain whether, by then, it would be possible to put Hawaii back together.

The State Parties' myopic view of the question presented ignores that the State of Hawaii holds the 1.2 million acres as Trustee of the federally-created Ceded Lands Trust for all the people of Hawaii.[4] It

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[4] Justice Breyer's concurring opinion with whom Justice Souter joined in *Rice v. Cayetano*, 528 U.S. 495, 525 (2000), "But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii." *Day v. Apoliona*, 496 F.3d 1027, 1034, n.9 (9th Cir. 2007) ("Justice Breyer noted that, unlike a trust for an Indian tribe, the lands ceded in the Admission Act are to benefit "*all* the people of Hawaii," not simply Native Hawaiians.") (The 1.2 million acres consists of the 1.4 million acres returned to Hawaii upon statehood under Admission Act §5(b), less the about 200,000 acres Congress had set aside in 1921 as "available lands" under the Hawaiian Homes Commission Act. See also, Admission Act §5(g). It is this same 1.2 million acres which is the corpus of the Ceded Lands Trust

(Continued on following page)

would have this Court turn a blind eye to ongoing violations by State Parties and OHA Trustees of basic trust law and Equal Protection principles applicable to the federally created Ceded Lands Trust.

By not challenging the Hawaii Supreme Court's acceptance of the tendentious "whereas" clauses of the Apology resolution as historical truth, the State would have this Court implicitly condone the re-writing of Hawaii's history.

2. The State's Revelation: The Ceded Lands Trust has never generated annual net income. Therefore, distributions of trust revenues only to OHA for native Hawaiian beneficiaries, and none to or for the rest of the beneficiaries, were and are illegal.

On June 4, 2008 in *Day v. Apoliona*,[5] the State, apparently for the first time in history, publicly accounted for, at least in part, and acknowledged that the Ceded Lands Trust costs the State many times

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burdened by the injunction ordered by the Hawaii Supreme Court.)

"The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

[5] *Day v. Apoliona*, No. CV05-00649 SOM-BMK, U.S. District Court, Hawaii, June 4, 2008. The State's June 4, 2008 motion for summary judgment, memo in support Docket # 142 and separate concise statement Docket # 143 are accessible through PACER.

more annually than the 1.2 million acres bring in. The State also acknowledged that this has been so for every year since Statehood; and that the State had never previously made that argument to the District Court or to the Ninth Circuit.

This "bombshell" revelation by the State means that since 1959 the Ceded Lands Trust has never generated any annual net income from which distributions could lawfully be made to any Ceded Lands Trust beneficiaries. As the State argued vigorously and correctly to the Hawaii Supreme Court in a related case in 1999, beneficiaries of the Ceded Lands Trust are entitled to, and only to, net income after trust expenses.[6]

Thus, the hundreds of millions of Ceded Lands Trust revenues the State has distributed to OHA exclusively for native Hawaiian beneficiaries over the last three decades have illegally diverted trust funds equitably owned by all the people of Hawaii. Such conduct would appear to meet the definitions of HRS §708-874 (Misapplication of entrusted property, a misdemeanor), or Theft, HRS §708-830(6)(a) (Failure to make required disposition of funds, a felony).

Since the State itself presented these facts as undisputable, documented them with the declaration

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[6] The State's June 4, 2008 revelation is covered in depth in Wendell Marumoto's Opening Brief at 29-45 filed 10/30/2008 in the Ninth Circuit No. 08-1668, available on PACER and at http://www.aloha4all.org/documents/81030_WM_OpeningBrief.pdf.

of the State's highest financial officer, and with official data, and forcefully and correctly spelled out the law that beneficiaries of the Ceded Lands Trust are entitled only to net income, it would be entirely appropriate for this Court, if it reverses the Hawaii Court, to direct that such distributions must cease.

3. *Trustees of Dartmouth College v. Woodward.*

In 1819, Chief Justice John Marshall held that the charter granted by the British Crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, was a contract within the meaning of that clause of the Constitution of the United States (Art. I, §10), which declares, that no state shall make any law impairing the obligation of contracts.

The state of Vermont was a principal donor to Dartmouth College. The lands given lie in that state and are of "great value." The State of New Hampshire also donated lands of "great value." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 574 (1819).

After the trustees had operated the college beneficially for nearly 50 years and after the revolution, the New Hampshire legislature, controlled by Republican supporters of Thomas Jefferson, passed a bill revising the charter of Dartmouth College, adding new trustees and a board of overseers. The trustees refused to accept the changes and filed suit to invalidate them.

C.J. Marshall held that the royal charter had "every ingredient of a complete and legitimate contract." He ruled that the trustees were "one immortal being" whose powers continued forever and could not be abridged by legislative acts.

Hawaii's Ceded Lands Trust, for "educational and other public purposes" was also endowed with public lands and also founded with every ingredient of a complete and legitimate contract. On June 16, 1897 the Republic of Hawaii, by its proposed Treaty of Annexation, offered to cede to the United States its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) with the requirement that all revenue from or proceeds of the lands, except those used for civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Another condition of the Republic's offer was that "The public debt of the Republic of Hawaii" was to be "assumed by the government of the United States, but the liability of the United States in this regard shall in no case exceed $4,000,000."

A year later, on July 7, 1898, by the Newlands Resolution, the United States accepted the offer, expressly including the conditions that it hold the lands in trust and that it assume the debts accumulated by the Kingdom and Republic up to $4 million.

As this Court said, "Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds." *Id.*, 17 U.S. 565.

That basic legal principle of trust law enforcing contractual obligations undertaken by the sovereign, announced 189 years ago, is now found in Restatement (Third) of Trusts §64 (2003) current through August 2008,

> §64. Termination Or Modification By Trustee, Beneficiary, Or Third Party
>
> **(A) Except as provided in §§65 and 68, the trustee or beneficiaries of a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust.**
>
> **(B) The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is presumed to be held in a fiduciary capacity.**

Since the Ceded Lands Trust gives no trustee, beneficiary or third party any right to modify or change the terms of the Ceded Lands Trust, as a matter of law, neither the State of Hawaii, nor the Hawaii Supreme Court, nor Congress, whether by the

Apology resolution or any other law, has the power to impair the obligations to all the people of Hawaii undertaken by the United States in 1898 in the Annexation Act, and assumed by the State of Hawaii in 1959.

Again, if this Court reverses the Hawaii Court, it would be appropriate to apply this straightforward rule of trust law and direct that the unauthorized alterations favoring selected beneficiaries are void and must cease.

4. In cases involving alleged racial discrimination, courts do not accept legislative allegations or conclusions, but rigorously scrutinize them.

What deference, if any, a court should accord legislative findings is not a question of "judicial notice" in the sense covered by the Federal Rules of Evidence but a question of constitutional law. For purely economic legislation judged by the minimal scrutiny of the rational basis test, the courts are deferential to legislative findings unless they are plainly false or irrational. See, e.g., *Railway Express v. New York*, 336 U.S. 106 (1949). But when the issue is whether the statute uses a suspect classification, such as race, or infringes a fundamental right, the courts do not defer to legislative findings but rigorously scrutinize them. This is true even if the government denies in the statute itself that it is discriminating based on a suspect classification or

infringing a fundamental right. Otherwise a legislature could utterly frustrate protection of constitutional rights by adding tendentious findings of "fact" to immunize its laws from independent judicial review. "Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace." *U.S. v. Morrison*, 529 U.S. 598, 615 (2000).

This Court in *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) has determined that the definitions of "Hawaiian" and "native Hawaiian" are racial classifications. These are the classes that the State constitutional and statutory laws at issue in this case are intended to benefit. Consequently, the "most rigid scrutiny" applies to any attempt to justify use of these classifications, whether by alleged fact-finding or otherwise.

The legislative statements that the Hawaii Supreme Court cites to establish the facts on which its injunction rests (the 1993 Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993)) suffer from an additional defect: they are not part of the statute on which this suit is based, the 1959 Admission Act, or Article XII of the Hawaii Constitution and the State OHA Statutes implementing it, and so are irrelevant to this case.

Legislative statements in a preamble may help a court interpret the operative clauses of a particular statute by clarifying the legislative intent relating to

the statute to which the preamble is attached, but they do not legislate facts or confer rights. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, §20.03 (5th ed. 1993). A preamble does not clarify the intent of a legislature that enacted a different statute decades earlier. Congress enacted the Admission Act in 1959. The Ceded Lands Trust is the subject of this suit. That trust originated in 1898 with annexation, was reiterated in the Organic Act in 1900 and continued by the Admission Act in 1959. Congress was of course not relying in 1898 or 1900 or 1959 on the "whereas" clauses found in the 1993 "Apology Resolution." Nor was the State in 1978 when it adopted Art. XII of the Hawaii Constitution or in the Statutes implementing it before 1993.

The Hawaii Supreme Court relies chiefly on the "whereas" clauses to the so-called "Apology Resolution." Because that resolution has no legally operative provisions and is not the subject of this lawsuit, these "whereas" clauses do not determine the intent or effect of the statute on which Plaintiffs rely.

Congress intended no change in the status quo by passing the Apology Resolution. The resolution expressly does not resolve any claims. 107 Stat. 1510 §3. The Senate Committee Report informed Congress that the resolution would have no regulatory impact and "will not result in any change to existing law." S. Rep. 103-126. There were no fact-finding hearings or floor debate about the accuracy of the factual claims. It can hardly be compared to the social science research

used in *Brown v. Bd. of Education*, 347 U.S. 483, 494, n.11 or a "Brandeis brief."

The resolution's sponsor, Senator Daniel K. Inouye, assured the Senate that it is only "a simple resolution of apology." He emphasized this point to reassure his colleagues that the resolution would have no effect on any controversial questions:

> As to the matter of the status of Native Hawaiians, as my colleague from Washington knows, from the time of statehood we have been in this debate. Are Native Hawaiians Native Americans? This resolution has nothing to do with that. This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that. It is a simple apology.

CONGRESSIONAL RECORD Vol. 139 at S14477, S14482 (Oct. 27, 1993). Thus, the Resolution has no bearing on the status of Native Hawaiians or the 1959 Admission Act or this case.

5. Victimhood claims unjustified. U.S. a success story for Hawaiians.

The civil rights movement of the 1960's (which triggered the "Hawaiian Renaissance") also had a negative spin as peoples everywhere became increasingly sensitive to racial differences not only as sources of inequity and injustice but as opportunities for individual self-aggrandizement. Claims to compensation

for group injustices began to be advanced around the globe by ethnic leaders.

But correcting for past injustices is a special problem for racial groups, such as Hawaiians, not justified in claiming to be victims. The foul deeds committed against their ancestors since 1778, as before, were almost all committed by other Hawaiians. Nevertheless, despite the demerits of their claims of racial injustice, Hawaiians with increasing frequency put themselves forward in the public arena as champions of a victimized race whose status and civil rights had been denied, and who might therefore claim compensatory entitlements. This led to "Hawaiianizing" the trustees of Bishop Estate and turned the estate to a policy of disassimilation contrary to the Princess's goal of integration. *Id.*[7]

America's acceptance in 1898 of the Republic of Hawaii's offered Treaty of Annexation[8] was the logical culmination of the friendly and mutually beneficial trading relationship between the two countries. The United States is Hawaii's closest large neighbor, even more so after 1850 when California became a state. The irresistible mutual attraction between the people

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[7] Condensation of text from *Testamentary Incorrectness:* A Review by Paul D. Carrington, Vol. 54 Buffalo Law Review 693, 705-706, Dec. 2006.

[8] September 9, 1897 the Senate, Republic of Hawaii ratified the proposed Treaty of Annexation. http://tinyurl.com/yofozz. This was accepted by the U.S. by the Annexation Act, 30 Stat. 750 1898.

of Hawaii and the people of America, Europe and Asia, is a fact of history.

6. Hawaii's Economic System in 1778.

After 500 years of isolation, the Hawaiian islands were "discovered" in 1778 by British explorer, Captain James Cook. What Cook found was the most hierarchical of the Polynesian chiefdoms.[9] Each of the major Hawaiian islands was separately ruled by a paramount chief or *ali'i nui*. The ruling classes generally did not engage in economically productive work, except for the managerial skills of the *konohiki*, lesser chiefs who served as property managers. Chiefs, from the head of the smallest *ahupua'a* (land district) to the *ali'i nui*, basically lived off the labor of the *maka'ainana* (commoners or tillers of the soil), as did their courtiers, warriors, priests, administrators, policemen, servants and hangers-on. Estimates vary as to the size of the tax burden that commoners bore to support this upper structure, ranging from more than half to about two-thirds of the fruit of the commoners' labor.[10] In these social formations, "high rank holds the rule and possesses the land title: commoners are subject and landless."[11]

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[9] Kirch, *On the Road of the Winds* at 247, Univ. of California Press, 2000.

[10] Hitch, *Islands in Transition, The Past, Present and Future of Hawaii's Economy* at 15, First Hawaiian Bank, 1992.

[11] Kirch, *On the Road of the Winds, supra* at 249.

7. In Hawaii, as everywhere, the good old days were not all that good.

Interwoven with the religion of Hawaii (and of all Polynesia) and with governmental and social organization, was the *kapu* system. This was the feature of the Hawaiian culture which made the deepest impression upon most of the early foreign visitors, who saw only the outer manifestations of the system and who, in their descriptions emphasize its bizarre restrictions and cruel sanctions.[12]

The condition of the common people was that of subjection to the chiefs, compelled to do their heavy tasks, burdened and oppressed, some even to death. The life of the people was one of patient endurance, of yielding to the chiefs to purchase their favor. The plain man (*kanaka*) must not complain.[13]

If the people were slack in doing the chief's work they were expelled from their lands, or even put to death. For such reasons as this and because of the oppressive exactions made upon them, the people held the chiefs in great dread and looked upon them as gods.[14]

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[12] Kuykendall, *The Hawaiian Kingdom*, 5th Ed., Vol. 1 at 8, University of Hawaii Press, 1938.

[13] Malo, *Hawaiian Antiquities*, Bishop Museum, Translated from the Hawaiian 1898 2d Ed. at 60-61, #63.

[14] Malo at 61, #64.

The following practices were considered *hewa* by the landlord, that one should give himself up to the fascinations of sport and squander his property in *puhenehene*, sliding the stick (*pahe'e*), bowling the *ulumaika,* racing with the canoe, on the surfboard or on the *holua* sled, that one should build a large house, have a woman of great beauty for his wife, sport a fine *tapa*, or gird one's self with a fine *malo*. All of these things were regarded as showing pride, and were considered valid reasons for depriving a man of his lands, because such practices were tantamount to secreting wealth.[15]

The Hawaiians had no money, nor anything that stood as an accepted representative of value to take its place. In the barter carried on between them and the ships in the early days of intercourse with the foreigner, the value of the pig was reckoned by the Hawaiian in proportion to his length, so much for the pigling of the length of the forearm, so much hoop-iron for the three-foot porker, and so much for the full-grown, fathom long (*anana*) hog (New Zealand, *whanganga*).

The one barrier that stood in the way of the invention and adoption of some tangible representative of value was the selfish and exclusive policy of the chiefs, which allowed the poor *kanaka* to possess

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[15] *Id.* at 74, #13.

nothing he might call his own, not even his *malo* or his wife.[16]

One thing which the priest urged upon the king was to kill off the ungodly people, those who broke tabu and ate with the women or who cohabited with a woman while she was confined to her infirmary, and the women who intruded themselves into the *heiau*.[17]

Another thing he urged was that the woman who beat *tapa* on a tabu day, or who went canoeing on a tabu day should be put to death; also that the man who secretly left the service at the temple to go home and lie with his wife should be put to death; that the men and women who did these things, whether from the backwoods (*kua'aina*) or near the court, should be put to death.[18]

8. The United States in 1778.

In 1778, the United States consisted of the 13 former British colonies on the Atlantic seaboard of America. They were engaged in the Revolutionary war triggered, among other grievances, by the British monarchy's oppressive taxation. The economy of the new United States soon intertwined with Hawaii's as merchant ships carrying furs from Alaska and the

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[16] Malo at 80, Notes on Chapter 22.

[17] *Id.* at 188 #9.

[18] *Id.* at 188 #10.

Pacific Northwest to China began taking on sandalwood from Hawaii, as well as provisions. Then, as the ships carrying off the sandalwood of Hawaii disappeared, a new kind of vessel began arriving at the ports of the kingdom, the New Englanders hunting whales to light the lamps of America.[19]

9. Hawaii's search for security in an insecure world.

Kamehameha I (who would later unite the islands and become their first king) had seen Cook's British men of war in 1778, La Perouse's two French naval vessels that visited in 1786 and Vancouver's warships in 1792, 1793 and 1794. It was obvious to Kamehameha that the continued independence of his little kingdom hinged on having one of these powers as a protector. In 1794 he agreed with Vancouver to a "solemn cession" of the Island of Hawaii (which was all he controlled at the time) to Great Britain, which would own the island but not interfere in domestic affairs. The British crown never took official cognizance of this agreement but until his death in 1819, Kamehameha felt that he had a solid defensive alliance with Great Britain.[20]

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[19] Hitch, *Islands in Transition, supra* at 40, 41.

[20] Hitch, *Islands in Transition* at 32.

10. 1819, Kamehameha II abolishes the *kapu* system. 1820, First American missionaries arrive. Kaahumanu takes charge of Christianity, makes it the new path to *mana*.

In 1819, shortly after the death of Kamehameha the Great, his son Liholiho, the new King Kamehameha II, broke the *kapu*, dismantled the *heiau* and burned the wooden idols. Into this religious vacuum, the first American missionaries arrived the next year, 1820, and soon Kaahumanu took charge of Christianity, made it the new *kapu*, displacing *Lono* and *Ku* as the path to *mana*.[21]

11. Hawaii sits astride principal Pacific trade routes. Embraces western institutions.

By 1830 the United States had replaced Great Britain as the accepted friend and most likely protector of the little kingdom. The expansion of American interests into this region was a by-product of the trans-Pacific trade in furs and sandalwood. Manufactured goods destined for California and Oregon were distributed from Honolulu and exports from those territories were sent to Honolulu for transshipments to Europe or to the United States. The trade which linked Honolulu, Monterey, and the mouth of the Columbia in an economic interdependence was carried almost exclusively in American vessels and was

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[21] *Native Lands and Foreign Desires*, Kama'eleihiwa 154-157.

controlled by American merchants, many of whom resided either in Honolulu or in California.[22]

As Stanford University Professor Harold Bradley concluded,[23] in reference to the time period 1789-1843, this development of a Polynesian kingdom with Western institutions was, in part, the result of the location of the Hawaiian Islands astride the principal trade routes of the northern and central Pacific. It had been possible only because of the ready amiability with which the Hawaiian chiefs and commoners had welcomed all classes of foreigners to the Islands. The principal forces in the creation of the new Hawaiian kingdom, however, had been the few score of American traders and missionaries who had made the Islands their home and whose energy in the introduction of the political, religious, and economic ideals of their native land had established an American frontier in Hawaii.

12. Hawaii's economic system in 1890.

Between the death of Kamehameha I in 1819 and the death of King Kalakaua in January 1891, the *ali'i nui* themselves had abolished the *kapu* system; adopted a Bill of Rights laying the legal basis for a free-enterprise economy, under which the people of Hawaii were set free to work and otherwise manage

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[22] Bradley, *The American Frontier in Hawaii* at 392-394.

[23] *Id.* at 465-466.

their affairs as they wanted and to accumulate personal property and pass it along to their heirs; provided Hawaiians with a written form of their previously oral language and established widespread public schools and an exemplary level of literacy among all classes; adopted an American-style constitution giving commoners an institutional voice in the government and guaranteed a regime of law for business transactions and property holding; Kamehameha III and 245 chiefs had agreed among themselves how much land should go to the crown and how much to the chiefs and in 1850 the legislature had ordered grant of fee-simple titles to native tenants for their *kuleanas*, the parcels of land cultivated by them. By the end of the *mahele*, or land division, in 1855, less than 30,000 acres were awarded to the native tenants. However, these tracts of land consisted chiefly of taro lands and were considered the more valuable lands in the Islands.[24] The *kuleana* grants put land into the hands of about two out of every three Hawaiian families, said to be "a record of fee simple ownership among natives unique in the early 19th century."[25]

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[24] Chinen, *The Great Mahele, Hawaii's Land Division of 1848*, University of Hawaii Press, 1848 at 31.

[25] Hitch, *Islands in Transition*, *supra* at 30.

13. 1893, Queen Liliuokalani secures passage of lottery, opium and distillery bills, announces new constitution. Business and political establishment revolts. Overthrow.

On Saturday January 14, 1893, Queen Liliuokalani violated her oath taken just two years earlier to uphold the existing constitution. She announced her intention to promulgate a new constitution giving herself more absolute power.[26] Shortly before that day, she had secured passage of a lottery law and one legalizing importation of opium and another for a distillery. For much of the kingdom's business and political establishment, this was the last straw. They revolted. On Sunday January 15th notices were posted for mass meetings of the opposing sides for the following Monday. Uncertainty prevailed. On Monday January 16th, Captain Wiltse on the U.S.S. Boston, just back from a training voyage, found an interregnum, uncertainty about who, if anyone was in charge. (Put into http://morganreport.org search window the word "interregnum.") He sent 162 sailors and marines ashore, to protect American lives and property. The marines went to the U.S. legation at Nuuanu and School Streets and the consulate at Merchant Street. The sailors marched down King Street, dipped their

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[26] Russ, *The Hawaiian Revolution (1893-94)* at 66, 67, Susquehanna University Press; 3 Kuykendall, *The Hawaiian Kingdom* at 586, summarizes proposed changes which would "give the queen more power and influence over the government than had been possessed by Kalakaua at the beginning of his reign." Also, morganreport.org, Emerson testimony at 536-537.

colors respectfully to the Queen as they passed Iolani Palace and continued on to King and Alapai Streets. They were quartered that night at Arion Hall out of sight from the Palace and separated from it by the Music Hall on King Street.[27] The troops did not cooperate with the revolutionists' committee of safety and the committee had no more knowledge than did the Queen's Government where the troops were going nor what they were going to do.[28] On Tuesday January 17th, the committee occupied the government building, Aliiolani Hale, read a proclamation deposing the Queen, abrogating the monarchy and establishing a provisional government until the terms of annexation were negotiated with the United States.[29] After learning the provisional government was in possession of the government building, U.S. Minister Stevens recognized the provisional government as the *de facto* government of Hawaii. The Queen then surrendered under protest.[30]

14. Republic, then Annexation, then Statehood.

Sanford B. Dole, President of the new Provisional Government, promptly sent a delegation to Washington seeking annexation, but the new President, Grover Cleveland, opposed annexation and tried to restore

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[27] Russ, *supra* at 82; Kuykendall, *supra* at 595.

[28] 3 Kuykendall, *supra* at 594.

[29] Russ, *supra* at 86-90.

[30] Russ, *supra* at 95, 96.

the Queen. But he reversed himself upon receipt of the Morgan Report, http://morganreport.org of February 26, 1894 refusing requests from the queen for further aid in her restoration, and acknowledging both the Provisional Government and Republic of Hawaii as the legitimate successors to the Kingdom. Queen Victoria of Great Britain, a friend of the former Queen Liliuokalani, also recognized the Republic as the lawful government of Hawaii.[31] Letters personally signed by emperors, kings, queens and presidents of at least twenty nations on four continents in eleven languages, recognized the Republic under President Sanford B. Dole as the rightful successor government of Hawaii.

In 1897, after President Cleveland had left office, the Republic of Hawaii again proposed a treaty of annexation. At first the Senate was unable to muster the two-thirds vote for ratification, but following the outbreak of the Spanish American War in 1898, the U.S. Congress passed a joint resolution accepting the Republic of Hawaii's proposed treaty of annexation.[32] The vote was 42-21 in the Senate and 209-91 in the House.

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[31] Russ, *The Hawaiian Republic* at 47, recognition granted to the new Government by Queen Victoria Nov. 15, 1894. Photos of all the original documents are available at http://tinyurl.com/4wtwdz.

[32] Newlands Resolution (Annexation Act) 30 Stat. 750, July 7, 1898.

The Organic Act in 1900[33] gave all citizens of the former Republic, including Native Hawaiians, full U.S. citizenship. The Territory of Hawaii's first Delegate to Congress, Native Hawaiian Robert Wilcox, was elected on the promise that "The first bill I shall introduce will be one to admit Hawaii to Statehood."[34] In 1903, the first Legislature of the Territory of Hawaii, with more than 70% of its members being Native Hawaiian, unanimously resolved to ask Congress to convene a constitutional convention to create a constitution for the proposed State of Hawaii.[35] In 1919 Hawaii's elected Territorial Delegate Prince Jonah Kuhio Kalakaua Kalaniana'ole (heir to the throne if the Kingdom had continued) introduced in Congress the first bill for Hawaii statehood. As of 1954, thirty-three bills for statehood for Hawaii had been introduced in Congress by Hawaii's Territorial delegates since 1919.[36]

In the 1940 Hawaii Statehood plebiscite, two out of three Hawaii voters said "Yes for Statehood" but Congress was not yet ready. In 1959, the people of Hawaii finally achieved their long sought goal. Congress proposed, over 94% voted "Yes" and Hawaii became the 50th State of the Union. Results of Votes Cast, T.H. 1959, http://tinyurl.com/2rbx79.

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[33] Organic Act, 31 Stat. 141, April 30, 1900.

[34] The evening Bulletin, July 12, 1901.

[35] S.L.H. 1903 at 377.

[36] Senate Report 886 of January 27, 1954.

15. Hawaiians wanted children to be taught English to open up wider opportunities.

Act 57, sec. 30 of the 1896 Laws of the Republic of Hawai'i, read as follows: "The English Language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department." See web site Answers.com available at http://www.answers.com/topic/hawaiian-language (last visited on 3/23/2007), which notes that "[t]his law established English as the main medium of instruction for the government-recognized schools, but it did not ban nor make illegal the Hawaiian language in other contexts. The law specifically provided for teaching languages 'in addition to the English language.' Hawaiian-language newspapers were published for over a hundred years, right through the period of the supposed ban. . . . The longest run was that of *Ka Nupepa Kuokoa*: about 66 years, from 1861 to 1927."

By 1850 a strong desire existed among many of the Hawaiians to have their children taught English in order to open to them wider avenues for advancement. In 1854 a law was enacted by the Kingdom legislature "for the encouragement and support of English schools for Hawaiian youth." "This was the

beginning of a movement which ended many years later with the complete abandonment of the Hawaiian language as a medium of instruction in the public schools of Hawaii."[37]

Princess Bernice Pauahi Bishop herself was fully in accord. Clause Thirteenth of her will requires her trustees to "provide first and chiefly a good education in the common English branches." The Schools' 1885 Prospectus observed: "The noble minded Hawaiian chiefess who endowed the Kamehameha Schools, put no limitations of race or condition on her general bequest. Instruction will be given only in English language, but the Schools will be opened to all nationalities."[38]

16. Hawaiians prosper with equality.

The 2005 American Community Survey (ACS) for California, recently released by the U.S. Census Bureau, confirms Native Hawaiians' ability to prosper without special government programs. The estimated 65,000 Native Hawaiian residents of California, with no Office of Hawaiian Affairs or Hawaiian Homes or other such race-based entitlements, enjoyed higher median household ($55,610) and family ($62,019) incomes, relative to the total California population ($53,629 and $61,476 respectively) despite having

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[37] Kuykendall, *The Hawaiian Kingdom*, Vol. 1 at 360-362.

[38] *Doe v. Kamehameha Schools*, 416 F.3d 1025, 1028 (9th Cir. 2005).

smaller median household and family sizes. "Hawaiians do better without entitlements" by Jere Krischel, Honolulu Advertiser, January 9, 2007, http://tinyurl.com/ytryoz.

17. Kamehameha Schools/Bishop Estate has corrupted the government of the State of Hawaii, pursues hereditary superiority, disassimilation.

A remarkable book published two years ago reported that the trustees of Kamehameha Schools/Bishop Estate ("KSBE") have so corrupted the political process in the State of Hawaii that the legislative, executive and judiciary powers have been, and still seem to be, concentrated in the hands of those who facilitated "A World Record for Breaches of Trust" by trustees and others of high position, without surcharge or accountability. *Broken Trust: Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust,* King and Roth, 2006.

Sixty Minutes called it "The biggest story in Hawaii since Pearl Harbor; KSBE was characterized by The *New York Times* as "A feudal empire so vast that it could never be assembled in the modern world"; and by Howard M. McCue III, the Chairman of the Charitable Planning Committee for the American College of Trust and Estate Counsel, as the most significant legal dispute of our time . . . a tale of unbridled ambition, infectious greed, and high drama. . . . www.brokentrustbook.com.

Corruption within Bishop Estate Reached the Highest Levels of Government, But Major Records Still Under Seal, Six Prominent Community Leaders Share Their Part in the 'Broken Trust' Controversy, Call for Release of More Than 1 Million Pages of Documents Kept Secret by the Court By Malia Zimmerman, 7/10/2006, http://tinyurl.com/pwsgg.

KSBE put legislators on its payroll and used its alumni association as its proxy to lobby. Hawaii Reporter, *What Does Broken Trust Book Say About Ed Case and Dan Akaka?* http://tinyurl.com/3x9fho.

The Honolulu Star-Bulletin special Series Edition at http://starbulletin.com/specials/bishop.html provides links to stories illustrating KSBE's activist role in promoting segregation. See, for example, Aug. 4, 2005, "Rallies show school support." At one of the rallies organized by KSBE, one speaker, a tenured professor at U.H. Manoa, had this to say, "Some white men against us say they have been here seven generations. Big deal. We won't assimilate and we won't go away, so sooner or later, America will have to deal with us."

The trustees appear to continue to support the Akaka bill S.310/H.R.505 [110th Congress] (which would "recognize" Native Hawaiians as a privileged class; establish a process for them to create their own sovereign government and allow the state government, still dominated by KSBE, to negotiate with the new Native Hawaiian government, also certain to be dominated by KSBE, to negotiate for the breakup and

giveaway of much of the domain of the State of Hawaii).

KSBE openly flaunts its sweeping political clout behind the Akaka bill. KSBE and its Alumni Associations of Northern and Southern California are members of CNHA, Council for Native Hawaiian Advancement, http://www.hawaiiancouncil.org/members.html. The nativehawaiians.com website, lists the co-conspirators: CNHA, the Kamehameha Alumni Association, the prominent entities [many under KSBE's hegemony] who support the Akaka bill; and National Council of La Raza, the organization that seeks to "liberate" the SouthWest. http://www.nativehawaiians.com/listsupport.html.

18. Racial tensions are simmering in Hawaii's melting pot.

So said the headline on the first page of USA Today 3/7/07 describing the attack Feb. 19th in the parking lot of the Waikele Mall on Oahu, when a Hawaiian family beat a young soldier and his wife unconscious while their three-year-old son sat in the back seat of their car. The attack, "unusual for its brutality," sparked impassioned public debate.

The USA Today article and related links may be found at http://tinyurl.com/2jle2e. See also The Gathering Storm, Chapter 1 of *Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State* by Kenneth R. Conklin, Ph.D., http://tinyurl.com/2f7p8b.

The brutality at Waikele Mall is a flashing red light. Over 1 million American citizens in Hawaii are under siege by what can fairly be called an evil empire dedicated to Native Hawaiian Supremacy. That empire is dominated by KSBE, the nation's largest charitable trust, which has already conquered Hawaii's government and much of its business establishment. Even the United States supports this invidious discrimination by annually funding multiple Hawaiian entitlements; and by failing to disavow the Hawaiian homelands compact in the Admission Act which mandates that the State of Hawaii keep on discriminating on the basis of race.

Professor Carrington, referring to KSBE, puts it this way:

> As the ambition to achieve disassimilation rose, the instinct of the state's citizens who lacked the appropriate ancestor was to humor those who did, seemingly in the hope that tolerance and modest support would enable all to remain amiable neighbors. Few if any citizens stepped forward to question efforts to assign White Guilt to the polychromatic people of the state when in 1993 Congress was asked to apologize for "the crime of 1893" and did so, with the possible implication that some further apology to a defiled group might be in order. . . . It discounted the possibility that its unwarranted apology might elevate the racist sentiment, as may have happened.

Testamentary Incorrectness: A Review by Paul D. Carrington, 54 Buffalo Law Review 693, Dec. 2006.

Thomas Sowell's *Affirmative Action Around the World* describes in chilling detail the consequences of "indigenous" movements in many countries strikingly similar to the events unfolding now in Hawaii. Sri Lanka, for example, is an island state that in 1948 was spoken of as an oasis of stability, peace and order. Within a decade, as a result of politicizing intergroup differences and instituting preferential policies, there were race riots, and ultimately civil war and horrible atrocities.

In 1785 James Madison said "it is proper to take alarm at the first experiment on our liberties . . . The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents."[39]

Taking alarm and opposing this empire are the *amici* and other citizens who seek to reinstate in Hawaii the idea that in the eyes of government there is only one race here, it is American.

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[39] James Madison: *Remonstrance against Religious Assessments*, 2 Writings of James Madison 183 (Hunt ed. 1901).

CONCLUSION

These *Amici* recommend that the Court declare:

A. The Apology resolution and the "whereas" clauses in it are of no probative value, and have no legal force or effect whatsoever;

B. Under *Trustees of Dartmouth College v. Woodward* and Restatement (Third) of Trusts §64 neither the State of Hawaii nor the United States have authority to modify the terms of the Ceded Lands Trust. Hawaii Constitution, Article XII §§4, 5 and 6 and HRS §10-13.3 and all other State laws purporting to give Hawaiians or native Hawaiians any right title or interest in the Ceded Lands Trust not given equally to other beneficiaries are unconstitutional and void; and

C. All funds or properties in OHA's hands derived from the Ceded Lands Trust, and all earnings or increase of those funds or properties, must be used for all the people of Hawaii, not just for Hawaiians or native Hawaiians; and

D. The Judgment of the Hawaii Supreme Court should be reversed and remanded directing it:

1. to enjoin any further distributions from the Ceded Lands Trust to OHA; and

2. to enjoin OHA from any further expenditures of Ceded Lands Trust funds, and any earnings or increase in those funds; and

3. to make such other orders as are necessary or appropriate to restore control of all such funds or other property in OHA's hands derived from the Ceded Lands Trust to the appropriate officer of the executive branch of the State of Hawaii.

Respectfully submitted,

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December 2008

AMICUS CURIAE BRIEF

B633

Supreme Court, U.S
FILED
JAN 29 2009
OFFICE OF THE CLERK

NO. 07-1372

IN THE

Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Hawai'i

BRIEF OF THE HAWAI'I CONGRESSIONAL DELEGATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE HAWAI'I CONGRESSIONAL DELEGATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Hawai'i Congressional Delegation respectfully submits this brief as *amicus curiae* in support of respondents.[1]

INTEREST OF *AMICUS CURIAE*

As the State of Hawai'i's congressional delegation, we have a strong interest in the interpretation and application of all statutes, including Public Law 103-150, 107 Stat. 1510 (1993) (the "Apology Resolution"), that address the United States' special relationship with the indigenous people of Hawai'i. Additionally, we have a particular interest in effectuating the reconciliation expressly contemplated by the Resolution between the Native Hawaiian people and the governments of the United States and State of Hawai'i.

Senator Daniel K. Inouye served in the Hawai'i Territorial Legislature from January, 1955 until July, 1959. In August, 1959, the Senator began his service in the United States House of Representatives, and since January, 1963, he has served in the United States Senate. Senator Inouye has been a

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus curiae* briefs are on file with the Clerk.

member of the Senate Committee on Indian Affairs for over twenty years, serving as the Committee's Chairman for eleven years.

Senator Daniel K. Akaka is the first United States Senator of Native Hawaiian ancestry. He represented the State of Hawai'i in the United States House of Representatives from 1977 to 1990, and has served in the United States Senate and as a member of the Senate Committee on Indian Affairs since 1990.

Representative Neil Abercrombie served as a member of the Hawai'i State Legislature from 1974 to 1986, and has represented the State of Hawai'i in the United States House of Representatives since 1991.

Representative Mazie K. Hirono has represented the State of Hawai'i in the United States House of Representatives since 2007. She served in the Hawai'i State Legislature from 1981 to 1994 and was Lieutenant Governor of the State from 1994-2002.

We fully agree with the arguments pressed by respondents for dismissal of the petition for a writ of certiorari, or alternatively, for vacatur and remand of the Hawai'i Supreme Court's decision. In addition, we write to emphasize the significance of the findings Congress made in the Apology Resolution, especially as they relate to the need for reconciliation with the indigenous Hawaiian people whose lands were taken from them after the overthrow of the monarchy. The Supreme Court of Hawai'i properly considered and relied upon Congress' considered findings in construing the State's fiduciary duties under State trust law, and in suspending the trans-

fer of those lands pending the resolution of the reconciliation process of Native Hawaiians' unrelinquished claims.

SUMMARY OF ARGUMENT

Contrary to the characterizations of petitioners and the United States, the Apology Resolution is not "simply an apology" devoid of substantive implications. Pet. Br. 30; *see* U.S. Br. 30. The Apology Resolution instead makes several important and historic factual findings that settle a long-standing debate over the legality of the overthrow of the Hawaiian monarchy, the United States' culpability for that takeover, and the unrelinquished claims of Hawai'i's indigenous people (referred to in this brief as "Native Hawaiians") concerning their national lands.[2]

The Apology Resolution thus entails more than a "moral" effect. U.S. Br. 30. As the Supreme Court of Hawai'i properly recognized, the Resolution and its findings appropriately guide the State and its courts (as they do Congress, the Executive branch, and the federal courts) as they move forward to effectuate the reconciliation with Native Hawaiians expressly supported by the Resolution. Contrary to petitioners' suggestion, that conclusion is not surprising. Apologies can and do serve valuable, practical functions, and federal courts have interpreted them to shape national obligations under federal law. The Supreme Court of Hawai'i committed no error in

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[2] Like the Apology Resolution, this brief uses the term "Native Hawaiian" to mean "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." Apology Resolution, 107 Stat. 1513.

likewise considering the Apology Resolution—in addition to state law—in determining the State's fiduciary duties under State trust law.

ARGUMENT

I. THE SUPREME COURT OF HAWAI'I PROPERLY RELIED UPON THE APOLOGY RESOLUTION IN APPLYING STATE LAW

Contrary to the contentions of petitioners and the United States, the Apology Resolution is more than "simply an apology" (Pet. Br. 30) "whose sole effect is a moral one" (U.S. Br. 30). Rather, the Resolution by its terms constitutes an official, definitive recognition and acknowledgment by Congress of the United States' culpability for the illegal overthrow of the Kingdom of Hawai'i and of the Native Hawaiians' unrelinquished claims to their ancestral lands. That acknowledgment differs from other statutes and resolutions that have expressed Congress' regret for acts that had already been recognized as wrong or unlawful. *See* U.S. Br. 29-30 (describing resolution apologizing for "slavery and Jim Crow"). The Apology Resolution instead ended a long-running debate over the United States' actions in Hawai'i over a century ago.[3] The Supreme Court of Hawai'i properly relied on those considered findings, and Congress' express support of the ongoing reconciliation with

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[3] The "turbulent history leading up to the creation of the State of Hawaii" (Resp. Br. 3) is set forth in some detail in this Court's opinion in *Rice v. Cayetano*, 528 U.S. 495, 499-511 (2000) and the Respondents' Brief, pp. 3-7. This brief discusses that history only as it relates to the Apology Resolution and the debate that preceded it.

the Native Hawaiian people, to inform its ruling below.

A. The Apology Resolution Settles A Century Of Debate In Both The Legislative And Executive Branches Over The Legality Of—And The United States' Responsibility For—The Overthrow Of The Kingdom Of Hawai'i

1. The widespread disagreement over the United States' responsibility for the overthrow of the monarchy of the Kingdom of Hawai'i and the debate over the corresponding duty (if any) of the federal government toward Native Hawaiians began soon after the overthrow of the monarchy on January 17, 1893. That same year, President Grover Cleveland ordered James Blount, former Congressman and Chairman of the House Committee of Foreign Affairs, to go to Hawai'i and investigate the events that led to the takeover. Message of the President to the Senate and House of Representatives, reprinted in S. Rep. No. 103-126, at 23-26 (1993). Blount complied with the President's directive and, upon concluding his investigation, reported that "United States diplomatic and military representatives had abused their authority and were responsible for the change in government." 107 Stat. 1511.

Based on Blount's investigation, President Cleveland described the overthrow in a letter to Congress as an "act of war" and "substantial wrong" that the United States "should endeavor to repair." 107 Stat. 1511; *see Rice*, 528 U.S. at 505 ("President Cleveland . . . denounced the role of the American forces and

called for [the] restoration of the Hawaiian monarchy.") (citing Message of the President to the Senate and House of Representatives, as reprinted in H.R. Rep. No. 53-243, at 3-15 (1893)). Congress, however, did not act on the President's recommendation. Instead, after lobbying by members of the Provisional Government that overthrew the monarchy, the Senate Committee on Foreign Relations agreed to conduct a new investigation into the overthrow. 107 Stat. 1511-12. That second inquiry resulted in the "Morgan [R]eport," an account of the takeover described in 1983 by the Native Hawaiian Study Commission as reaching a conclusion "almost opposite" that of the Blount report with respect to the United States' responsibility for the Hawaiian monarchy's overthrow. Native Hawaiian Study Commission, *Final Report to Congress on the Culture, Needs and Concerns of Native Hawaiians* 26 (June 23, 1983) (*Final Report*).

Congress took no action on the conflicting reports, and in 1894, the Provisional Government declared itself the Republic of Hawai'i. 107 Stat. 1512. In 1898, "as a consequence of the Spanish-American war," a new President, William McKinley, signed the Newlands Resolution, which provided for the annexation of Hawai'i to the United States. *Id.* The resolution also provided for Hawai'i to cede to the United States "1,800,000 acres of crown, government, and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people." *Id.*

2. "[F]rozen out of their lands" and "driven into the cities," the Native Hawaiian people suffered greatly. H.R. Doc. No. 66-839, at 4 (1920) (quoted in

Department of Interior and Department of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* 35 (Oct. 23, 2000) ("*From Mauka to Makai*")). In 1921, Congress recognized and sought to respond to the Native Hawaiians' plight by enacting the Hawaiian Homes Commission Act (HHCA), Pub. L. No. 67-34, 42 Stat. 108 (1921). The HHCA designated approximately 200,000 acres of land as "Hawaiian Homelands" to be made available to Native Hawaiians for homesteading and agricultural use. *See Rice*, 528 U.S. at 507; *Han v. United States Dep't of Justice*, 45 F.3d 333, 335 (9th Cir. 1995) (per curiam).

Thirty-eight years later, Hawai'i gained admission to the Union as a State. The Hawai'i Admission Act, Pub. L. No. 86-3 § 5(b), 73 Stat. 4, 5 (1959) ("Admission Act"), transferred title, from the United States to the State of Hawai'i, to most of the ceded public lands and public property within the State's boundaries. Those lands were to "be held by [the] State as a public trust" for five specified purposes, including the "betterment of the conditions of native Hawaiians." Admission Act § 5(f), 73 Stat. 6. The Act further provided that use of the land "for any other object shall constitute a breach of trust for which suit may be brought by the United States." *Id.*

Even as Congress provided for Hawai'i's admission to the United States and enacted initiatives designed to aid Native Hawaiians, however, Congress failed to resolve definitively the questions surrounding the United States' responsibility for the original overthrow of the monarchy and the seizure of Native Hawaiian land. Those issues again took center stage

in 1983, when Congress received another pair of dueling reports, this time issued pursuant to the Native Hawaiians Study Commission (NHSC) Act of 1980. That Act created a nine-member Commission to conduct a study and report on "the culture, needs and concerns of the Native Hawaiians." Pub. L. No. 96-565, Title III, §§ 301-305, 94 Stat. 3321, 3324-26 (1980).

In 1983, the NHSC issued a *Final Report to Congress on the Culture, Needs and Concerns of Native Hawaiians*, which consisted of a majority report (the *Final Report*) and a minority report entitled *Claims of Conscience: A Dissenting Study of the Culture, Needs, and Concerns of Native Hawaiians* ("*Claims of Conscience*"). The Majority Report, following the lead of the Morgan Report, concluded "that the United States bears no legal or moral responsibility or culpability for the actions of American officials at [the] time [of the overthrow of the monarchy]." *From Mauka to Makai* at 42; *see, e.g.*, *Final Report* at 28 (describing the "limited role of United States forces" in the overthrow and concluding, "as an ethical or moral matter," that the United States was not liable for the native Hawaiians' loss of land or sovereignty).

The NHSC Minority Report, which was joined by each of the three Hawaiian members of the Commission, dissented from the conclusion reached by the Majority Report. The Minority Report placed on the United States "a significant level of blame for the overthrow of the Hawaiian Monarchy." *From Mauka to Makai* at 42. The report also noted concerns with the "the historical methodology and objectivity of analysis" used by the majority, including "the selec-

tive and often misleading presentation of the background of events and forces leading to the overthrow of the Kingdom of Hawai'i." *Claims of Conscience* at ix.

Again, Congress took no action to "resolve the differences" between the two reports, or to "reach a conclusion about the appropriateness of the actions of the United States in the overthrow of the Monarchy." *From Mauka to Makai* at 42. And while Congress remained officially undecided, the Majority Report's rejection of responsibility for the 1893 overthrow "played a larger role in enunciating federal policy towards Native Hawaiians than [did] the minority report." Speech of Senator Daniel K. Akaka Before AHA Hawai'i 'Oiwi ("Akaka Speech") (Sept. 4, 1999), *available at* http://akaka.senate.gov/public/index.cfm?FuseAction=Speeches.Home&month=9&year=1999&release_id=1202.

3. On January 21, 1993, Senator Akaka introduced the Apology Resolution to "admit liability for the 1893 overthrow," and correspondingly to "neutralize the 1983 Native Hawaiians Study Commission's Majority Report conclusion that the U.S. government was not liable for the loss of sovereignty or lands of the Hawaiian people in the 1893 overthrow." Akaka Speech (Sept. 4, 1999); *accord* Hawai'i Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads: The Implications of the Apology Resolution and* Rice v. Cayetano *for the Federal and State Programs Benefiting Native Hawaiians* 19 (June 2001) (describing underlying goals of Apology Resolution); *see* 139 Cong. Rec. S195 (daily ed. Jan. 21, 1993) (statement of Sen. Akaka).

The plain text of the Apology Resolution definitively addressed a number of theretofore unresolved questions concerning the overthrow of the Hawaiian monarchy and the claims of Native Hawaiians to their ancestral lands. First, the Resolution "acknowledges" that the overthrow of the Kingdom was "illegal" and "resulted in the suppression of the inherent authority of the Native Hawaiian people." 107 Stat. 1513. The Resolution also "apologizes to Native Hawaiians" for the illegal overthrow of the Hawaiian monarchy and "the deprivation of the rights of Native Hawaiians to self-determination." *Id.* The preambulatory findings explained the nature of the "deprivation" of Native Hawaiians' "right of self-determination" and on the "suppression" of their "inherent sovereignty." *Id.*

Of particular relevance, Congress expressly recognized that the "self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States," and also "ceded 1,800,000 acres of" Hawaiian lands "without the consent of or compensation to the Native Hawaiian people or their sovereign government." 107 Stat. 1512. Relatedly, Congress further recognized that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty . . . or over their national lands." *Id.* And with respect to Native Hawaiians' unrelinquished claims concerning their lands, Congress explained that the "health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land." *Id.*

Finally, the Resolution expressly "support[s]," "recognizes," and "commends" the ongoing "reconciliation efforts of the State of Hawaii . . . with Na-

tive Hawaiians." 107 Stat. 1513. And the Resolution "expresses [Congress'] commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.* at 1513.

The legislative history of the Act reaffirms Congress' intention to acknowledge the United States' culpability in connection with the illegal overthrow of the Hawaiian monarchy; to recognize the ramifications of those actions, including the unrelinquished claims of Native Hawaiians to their lands; and to support the ongoing reconciliation process. *See, e.g.*, 139 Cong. Rec. S14477, 14480 (daily ed. Oct. 27, 1993) (statement of Sen. Inouye) ("We all know that the history and actions of our great country have been less than honorable in dealing with native peoples of this Nation. But, as I have indicated, this fact should not prevent us from acting to recognize and rectify these wrongs."); 139 Cong. Rec. H9627, 9632 (daily ed. Nov. 15, 1993) (statement of Rep. Mink) ("While history cannot be rewritten, it can—and must—be acknowledged," and "the United States should—and must—acknowledge its role in overthrowing the legal Government of the Kingdom of Hawai'i by issuing an official apology."); *id.* (statement of Rep. Thomas) ("[I]t is high time that the United States acknowledge its role in this regrettable affair."). Even those Members who opposed the resolution on other grounds noted their agreement "as Members that [the] violent overthrow of [the Kingdom of Hawai'i] government in an unauthorized way is something we ought to apologize for." 139

Cong. Rec. S14477, at 14482 (daily ed. Oct. 27, 1993) (statement of Sen. Brown).

Thus, the Apology Resolution was passed with broad bi-partisan support: by a roll-call vote of 65-34 in the Senate, and with unanimous consent in the House. *From Mauka to Makai* at 13; 139 Cong. Rec. H9627, 9632 (daily ed. Nov. 15, 1993). On November 23, 1993, President Clinton signed the Resolution. *From Mauka to Makai* at 13. And while Congress certainly had a "moral" purpose in enacting the Resolution, U.S. Br. 30, the text and legislative history make clear that it had in mind an important practical and substantive purpose as well: To acknowledge, once and for all, the illegality of the overthrow of the Kingdom of Hawai'i and its ramifications for Native Hawaiians, and to support and provide a foundation for the ongoing process of reconciliation with the Native Hawaiian people.

B. The Supreme Court Of Hawai'i Properly Relied On The Factual Findings Of The Apology Resolution In Construing The Scope Of State-Law Trust Obligations

The text and history of the Apology Resolution make clear that the Resolution is, indeed, a "milestone" in the reconciliation process. Resp. Br. 27. The Resolution articulates Congress' and the Executive's previously unannounced acceptance of responsibility for the overthrow of the Kingdom of Hawai'i and the claims of Native Hawaiians. Petitioners and the United States nonetheless suggest that the Supreme Court of Hawai'i erred in its consultation of the Resolution, which they dismiss as "simply an

apology." Pet. Br. 30; *see also* U.S. Br. 30 (grouping apologies with resolutions that are "unmistakably non-substantive"). Petitioners and the United States are mistaken.

That the Apology Resolution constitutes more than "simply an apology" is made clear by Congress' explicit description of the Resolution's operative provisions as encompassing both an "*ACKNOWLEDGMENT* AND APOLOGY." 107 Stat. 1513 (emphasis added). Petitioners and the United States err in attempting to treat the Resolution as if it amounted to nothing more than a statement of regret, and in minimizing the significance of Congress' "acknowledgments" in the Resolution.

1. "[P]ublic apologies . . . occupy a central role in resolving disputes in modern American culture." Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 Cornell L. Rev. 1261, 1268 (2006). They allow "the government . . . [to] face its wrongs squarely and accept public responsibility for violating legal norms." *Id.* at 1281. *See generally* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. 460, 462 (2003) (distinguishing between "safe" apologies, which are mere "expressions of sympathy," and actual apologies, which "explicitly accept responsibility for having caused injury" and have "legal consequences").

Accordingly, federal courts have relied on the terms of a congressional apology when construing the scope of the federal government's obligations under another federal law. The Federal Circuit, for example, has read the text of a congressional apology

to Japanese individuals interned during World War II to govern the proper interpretation of a reparations program enacted to compensate those individuals. *See Ishida v. United States*, 59 F.3d 1224, 1231 (Fed. Cir. 1995). The Court of Federal Claims likewise has rejected a "bureaucratic hair-splitting" interpretation of the same reparations statute, 50 U.S.C. App. § 1989b, reasoning that the statute "does not merely authorize a garden-variety benefit program, but rather embodies an extraordinary apology for what the Congress clearly viewed as the gravest of violations of 'basic civil liberties.'" *Murakami v. United States*, 52 Fed. Cl. 232, 240 (2002) (quoting the apology, 50 U.S.C. App. § 1989a(a)).

Courts have relied upon the factual findings supporting an apology in addition to the actual expression of remorse, recognizing, as this Court explained in *Rice*, that a court's role is to review events "as understood by the lawmakers, thus ensuring that [the court] accord[s] proper appreciation to their purposes in adopting the policies and laws at issue." 528 U.S. at 500; *see id.* at 505 (citing Apology Resolution); *see also Ishida*, 59 F.3d at 1231 (relying on congressional statement of fact preceding apology in 50 U.S.C. App. § 1989a(a)); *Jacobs v. Barr*, 959 F.2d 313, 319-21 (D.C. Cir. 1992) (upholding internment reparations program against constitutional challenge based in part on congressional statement of historical fact).

Moreover, contrary to the United States' position in this case (U.S. Br. 27), in *Rice*, the federal government expressly relied on "th[e] findings [of the Apology Resolution]" to assert that "indigenous Hawaiians, like numerous tribes in the continental

United States, have . . . unrelinquished sovereignty and territorial claims." Br. for United States as *Amicus Curiae* Supporting Respondent, *Rice v. Cayetano*, No. 98-818, at 17 (July 23, 1999). The United States errs in now discounting those findings here.

Indeed, that Congress expected the findings in the Apology Resolution to be relied upon is evident from the legislative history of the Act. Members of Congress debated not only the appropriateness of the sections expressing remorse but also the meaning and consequences of the factual findings. *See* 139 Cong. Rec. S14481 (daily ed. Oct. 27, 1993) (statement of Sen. Brown) (suggesting that the Resolution should be "clarif[ied]" because, as written (and passed) the "whereases" referred to "communal land tenure" and "unified monarchical government," and Senator Brown thought "we ought to be clear that we are not here apologizing for democracy or the concept of private property" but rather the "violent, forceful overthrow of government"). And Representative Thomas, for example, supported the Resolution on the ground that it "lays out in graphic detail what happened to Hawaiians and sounds a compelling call for justice." 139 Cong. Rec. H9627 (daily ed. Nov. 15, 1993); *see also id.* at H9632 (statement of Rep. Richardson) (explaining that the Resolution accomplishes two purposes: it (1) "spell[s] out the events which led to the overthrow of the Government of Hawaii, annexation, and finally to statehood" and (2) "also . . . apologize[s] to the people of Hawaii for the improper actions taken by a representative of this Government").

Like the federal courts that have relied upon the findings of congressional apologies, the Supreme Court of Hawai'i was entirely justified in consulting the considered findings of the Apology Resolution, in addition to state law, in determining the State's fiduciary obligations. *See Office of Hawaiian Affairs v. Housing & Community Dev. Corp. of Hawai'i*, 177 P.3d 884, 901 (Haw. 2008) ("Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands"); *id.* (Apology Resolution "plainly contemplates future reconciliation with the United States and the State with regard to those claims"); *id.* at 905 (noting Apology Resolution's recognition that Native Hawaiians are "'determined to preserve, develop and transmit to future generations their ancestral territory'") (quoting 107 Stat. 1510). And as respondents explain (Resp. Br. 19-32), the Apology Resolution provides a sound factual basis for the court's conclusions of State law. Congress not only apologized but also "acknowledged" the "ramifications" of the "illegal overthrow," including (1) the suppression of the Native Hawaiians' "inherent sovereignty," and (2) the loss of their "ancestral territory." 107 Stat. 1512, 1513. Congress recognized that Native Hawaiians have unrelinquished "claims to their inherent sovereignty" and "over their national lands," and Congress supported and expressed its commitment to resolution of those claims in the ongoing reconciliation process. *Id.* at 1512.

II. THE PROCESS OF RECONCILIATION WITH THE NATIVE HAWAIIAN PEOPLE CONTINUES TO MOVE FORWARD

As respondents recount (Resp. Br. 8-11), since the 1990s, Native Hawaiians have engaged in a reconciliation process with State officials, seeking to obtain additional recognition as a native people and to resolve their unrelinquished claims to ancestral lands. The State legislature has responded by enacting several measures that facilitate the reconciliation that the Apology Resolution anticipates. For example, in 1993, the legislature itself marked the 100th anniversary of the overthrow of the Kingdom of Hawai'i by acknowledging the illegality of the takeover. *See* Haw. H.R. Con. Res. No. 179. That same year, the legislature established the "Hawaiian Sovereignty Advisory Committee," to facilitate self-government of the Native Hawaiian people. 1993 Haw. Sess. Laws 359, § 2. The legislature also passed a statute that would, upon establishment of a sovereign Native Hawaiian entity, transfer to that entity management and control over the Island of Kaho'olawe. 1993 Haw. Sess. Laws 340, § 2. That island had previously been in the possession of the federal government; "in 1994, Native Hawaiians succeeded in their attempts to have [it] . . . returned to the State." *From Mauka to Makai* at 38. Throughout this reconciliation process, therefore, "[t]he Native Hawaiian people have worked to maintain their traditional social, cultural, religious, and linguistic ties and a cohesive community life." *Id.* at 50.

Additionally, since the Apology Resolution was enacted in 1993, members of Congress and the Ex-

ecutive branch have taken a number of steps to advance the process of reconciliation between the federal government and the Native Hawaiian people. In March 1999, for example, both the Department of Interior and the Department of Justice designated officials to represent them "in efforts of reconciliation between the Federal Government and Native Hawaiians." *From Mauka to Makai* at i. Recognizing that "'reconciliation' requires something more than being nice or showing respect"—it "requires action to rectify the injustices and compensation for the harm"—the Departments ultimately issued a final report (*From Mauka to Makai*) that made five recommendations to facilitate the reconciliation process moving forward. *Id.* at i, 4. One of their recommendations was that "the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes." *Id.* at 4.

Congress, too, has worked with the Executive Branch in order to further the reconciliation process. In 1995, for example, Congress enacted the Hawaiian Home Lands Recovery Act, Pub. L. 104-42, Title II, §§ 201-209, 109 Stat. 357 (Nov. 2, 1995) ("Recovery Act"). Congress recognized that the federal government had used, and was using, for military purposes, lands that had been set aside as Hawaiian Homelands by the HHCA. *See id.* § 203(b), 109 Stat 359; S. Rep. 104-119, at 9-10 (July 24, 1995). In enacting the Recovery Act, Congress provided a mechanism for the Secretary of the Interior to exchange for that military land other federal lands that are located in Hawai'i and under agency control. *Id.* In doing so, Congress again recognized the im-

portance of land to the Native Hawaiian people and took another step toward the reconciliation anticipated in the Apology Resolution.

Additionally, in 2004, Congress passed legislation that provided for the creation of the Office of Native Hawaiian Relations within the Department of Interior. *See* Pub. L. 108-199 § 148, 118 Stat. 3, 445 (Jan. 23, 2004) (appropriating "$100,000 . . . for the establishment of the Office of Native Hawaiian Relations"). That office "discharges the Secretary's responsibilities for matters related to Native Hawaiians and serves as a conduit for the Department's field activities in Hawaii." Office of Hawaii Relations, http://www.doi.gov/ohr/index.html.

Finally, Congress has repeatedly acted upon, although it has not yet passed, legislation introduced by Senator Akaka to "authorize a process for the reorganization of a Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship." S. Rep. No. 107-66, at 1 (Sept. 21, 2001). The House of Representatives passed such legislation in both 2000 and 2007, but the full Senate did not act on it. 146 Cong. Rec. H8146, 8153 (daily ed. Sept. 26, 2000) (passing H.R. 4904); 153 Cong. Rec. H11965, 11973 (daily ed. Oct. 24, 2007) (passing H.R. 505); *see* H.R. 505, 110th Cong. (2007); S. 310, 110th Cong. (2007); *see also* Resp. Br. 11 n.4. Furthermore, we plan to introduce similar legislation in the upcoming 111th Congress, and President Obama has repeatedly stated his support for such legislation, both on the Senate floor and during his presidential cam-

paign. *See* 152 Cong. Rec. S5576 (daily ed. June 7, 2006) (statement of Sen. Obama) ("I urge my colleagues in the Senate to vote for the Native Hawaiian Government Reorganization Act of 2005. I will be proud to add my vote to the roll call."); Statement of Presidential Candidate Sen. Barack Obama (Jan. 21, 2008) ("2008 Statement") (quoted in Office of Hawaiian Affairs, *Obama Supports Akaka Bill* (Jan. 21, 2008), http://www.oha.org/index.php?option=com_content&task=view&id=540&Itemid=224). As then-Senator Obama stated last January, "[t]his is an important bill, and if it is not signed into law this year, I will commit to support it as president." 2008 Statement, *supra*.

We, the congressional delegation for the State of Hawai'i, are confident that the time has come to effectuate the reconciliation the Apology Resolution supports and commends, thus restoring to the Native Hawaiians a measure of the sovereignty wrongly taken from them over a century ago. The Supreme Court of Hawai'i did not err in relying on Congress' findings and acknowledging this reconciliation to come.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents, the Court should dismiss the petition for a writ of certiorari, or alternatively, vacate and remand the decision of the Supreme Court of Hawai'i.

Respectfully submitted,

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January 29, 2009

AMICUS CURIAE BRIEF

114

(12)

No. 07-1372

Supreme Court, U.S.
FILED
DEC 11 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

This amicus curiae brief is presented on behalf of Mountain States Legal Foundation, a nonprofit, public-interest law firm with nearly 36,000 members, in support of the Petitioners, State of Hawaii, et al.[1]

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with nearly 36,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has been active particularly in the area of individual liberties and civil rights, having been counsel for plaintiffs in every phase of the proceedings in *Adarand Constructors, Inc.*,[2] *Concrete Works of*

[1] Pursuant to Rule 37.3(a), counsel of record states that the parties have consented to the filing of all amicus curiae briefs. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir.

(Continued on following page)

Colorado,[3] *Wygant v. Jackson Board of Education*,[4] and on the petition for certiorari for *Sherbrooke Turf, Inc.*[5] In addition, MSLF has participated in a number of other cases challenging the constitutionality of government-sponsored racial preference programs. MSLF has been dedicated for over twenty-five years to litigating for the equality of all persons, regardless of race, and to applying the same standard of judicial review—strict scrutiny—to all governmental racial classifications. MSLF is, therefore, well-qualified to comment on issues now before this Court.

ARGUMENT

The State of Hawaii did not argue that, if this Court construes the Apology Resolution to confer special benefits on persons of Hawaiian ancestry, the Resolution is unconstitutional because it violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment. Nonetheless, this is

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2000), reversed and remanded, *per curiam*, 520 U.S. 16 (2000); *Adarand v. Mineta*, 534 U.S. 103 (2001) (dismissed as improvidently granted).

[3] *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *certiorari denied*, 540 U.S. 1027 (2003) (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari).

[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[5] *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 541 U.S. 1041 (2004).

one question the Court must answer in construing the meaning and effect of the Apology Resolution. A universal rule of statutory construction is that "statutes should be construed whenever possible so as to uphold their constitutionality."[6] In this case, however, the Apology Resolution and its clear use of a racial classification fail to meet strict scrutiny. Others of the amici will demonstrate that, if the Apology Resolution is construed to confer special privileges on persons of Hawaiian ancestry, the Apology Resolution constitutes a preference for a racial group,[7] an assessment with which MSLF concurs wholeheartedly.

Equal protection of the law, as embodied in the Constitution, is founded on the principle that "distinctions between citizens solely because of their [race or] ancestry are by their vary nature odious to a free people whose institutions are founded upon the doctrine of equality."[8] Thus, "[a] racial classification, regardless of purported motivation, is presumptively invalid and may be upheld only upon an extraordinary justification."[9] Therefore, the use of racial classifications by any government, including the federal government and Congress, is "subject to the most exacting judicial scrutiny [and] it is the government's

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[6] *U.S. v. Vuitch*, 402 U.S. 62, 70 (1971).

[7] See, for example, Amicus Curiae Brief of Pacific Legal Foundation.

[8] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[9] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

burden to satisfy the demands of the extraordinary justification."[10] Moreover, that scrutiny requires a "most searching [and 'skeptical'] examination,"[11] in other words, "the strictest judicial scrutiny."[12]

There are only two possible interests that Congress could offer as a compelling interest: (1) that the United States' relationship with and constitutional authority over American Indian Tribes and their members is identical to Congress's relationship with and authority over persons of Hawaiian ancestry; and (2) that the United States has engaged, directly or passively, in discrimination against persons of Hawaiian ancestry, which conduct justifies race-conscious remediation. There is no evidence of either here.

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[10] *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).

[11] *Adarand 1995*, 515 U.S. at 223, 237. *Accord, Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions"); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

[12] *Adarand*, 515 U.S. at 224.

I. THERE IS A UNIQUE GUARDIAN-WARD TRUST RELATIONSHIP BETWEEN THE UNITED STATES AND AMERICAN INDIAN TRIBES.

A. CONGRESS'S CLAIM THAT ITS RELATIONSHIP WITH PERSONS OF HAWAIIAN ANCESTRY IS THE SAME AS WITH AMERICAN INDIAN TRIBES IS LEGALLY AND FACTUALLY WRONG.

The United States Congress has made the argument on numerous occasions that it possesses a special, unique, guardian-ward relationship with persons of Hawaiian ancestry that is identical to its relationship with American Indian tribes and their members. Congress reasons that this relationship allows Congress to legislate preferences for persons of Hawaiian ancestry, subject only to rational basis scrutiny. A prime example is the pending Akaka Bill,[13] which declares that the United States has a "special political and legal relationship with the native peoples of the United States, including Native Hawaiians,"[14] and a concomitant interest in ensuring their welfare. It further finds, "the special relationship of

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[13] The Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Congress (2007). It purports to establish a separate governmental entity for persons with Hawaiian ancestry with some, but not all, of the attributes of American Indian tribes and encourages "negotiation" by that entity with the State of Hawaii and the United States to achieve "reconciliation."

[14] *Id.* at Section 20(A).

American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States."[15]

Another example is from a section of legislation dealing with Native Hawaiian health care, which provides that "the authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."[16] Indeed, that statute claims that the United States "has a trust responsibility" to Native Hawaiians[17] and possess a "historical and unique legal relationship" with Native Hawaiians that "extends to the Hawaiian people the same rights and privileges accorded to American Indian ... communities."[18] Finally, if Congress, in enacting the Apology Resolution, did indeed divest the State of Hawaii of its land for the benefit of persons of Hawaiian ancestry, that Resolution is but one more example of Congress's mistaken belief on this subject.

Congress is legally and factually incorrect in its assertions. Congress and the United States have no relationship with persons of Hawaiian ancestry that

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[15] *Id.* at Section 22(D).

[16] 42 U.S.C. § 11701(17).

[17] *Id.* at § 18.

[18] *Id.* at § 19.

would provide a compelling interest to deal specially and separately, on the basis of ancestry, race, or ethnicity, with persons of Hawaiian ancestry. Indeed, there is no similarity whatsoever between persons of Hawaiian ancestry and American Indian tribes and their members vis-à-vis the United States. In fact, the United States has no legally cognizable relationship with persons of Hawaiian ancestry at all, except to the extent that such persons are citizens of the United States.

B. THE RELATIONSHIP BETWEEN THE UNITED STATES AND AMERICAN INDIAN TRIBES, WHICH BEGAN WITH GREAT BRITAIN, IS UNIQUE.

The unique relationship of American Indian tribes and their members with the United States began during the period of European exploration and discovery of the Americas. "The maritime powers of Europe discovered and visited different parts of this continent at nearly the same time."[19] Therefore, "[t]o avoid bloody conflicts . . . it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves."[20] This principle was "that discovery gave title to the government by whose subjects or by whose authority it

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[19] *Worcester v. State of Georgia*, 31 U.S. 515, 543 (1832).

[20] *Id.*

was made . . . which might be consummated by possession."[21]

Thus, the "general law of European sovereigns . . . limited the intercourse of Indians . . . to the particular potentate whose ultimate right of domain was acknowledged by the others."[22] Consequently, for American Indians, "goods indispensable to their comfort were received from the same hand."[23] More importantly, "the strong hand of government was interposed to restrain . . . intrusions into their country, from encroachments on their lands and from those acts of violence which were often attended by reciprocal murder."[24] Hence, the law of discovery regulated title between European powers, but did not "affect the [possessory] rights of those already in possession. . . ."[25] Though it "gave an exclusive right to purchase . . . it did not found that right on a denial of the right of possession to sell."[26]

The United States, after its successful revolution against the monarchy of Great Britain, "succeeded to all the claims of Great Britain, both territorial and political."[27] Great Britain, as did all the European

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[21] *Id.* at 543-44.

[22] *Id.* at 551-52.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 544.

[26] *Id.*

[27] *Id.*

powers, curried favor with American Indian tribes to obtain land and territory and to garner the support of those Indians in its conflicts with other European nations. In exchange, Great Britain provided Indians the food and goods they required as well as protection from other tribes, other European nations, and rogue individuals. Thus, Great Britain's superintendent of Indian Affairs, in a speech delivered in the presence of several Indian persons of distinction, stated:

> I inform you that it is the king's order . . . to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them. . . . But as you know that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose.[28]

Accordingly, the "Indian nations were . . . necessarily dependent on some foreign potentate for the supply of their essential wants and for their protection from lawless and injurious intrusions into their country."[29] Nonetheless, "this relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[30] When the United States succeeded to Great Britain's position, its relationship

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[28] *Id.* at 546.

[29] *Id.* at 555.

[30] *Id.*

with American Indian tribes did not immediately change.

C. THE UNIQUE RELATIONSHIP BETWEEN THE UNITED STATES AND AMERICAN INDIAN TRIBES GREW OUT OF THE SOVEREIGN, YET DEPENDENT, NATURE OF THE AMERICAN INDIAN TRIBES.

Due to the foregoing, "the condition of the Indians, in relation to the United States is . . . unlike that of any other two people in existence."[31] Indeed, it "is marked by peculiar and cardinal distinctions which exist nowhere else."[32] Thus, "those tribes which reside within the acknowledged boundaries of the United States . . . may more correctly . . . be denominated *domestic dependent nations*," rather than "*foreign nations*."[33] That is, "they are in a state of *pupilage* [and] their relations to the United States resemble that of a *ward to his guardian*."[34] As a result, Indian tribes and their members "look to our government for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants. . . ."[35]

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[31] *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 16 (1831).

[32] *Id.*

[33] *Id.* at 17 (emphasis added).

[34] *Id.* (emphasis added).

[35] *Id.* at 17.

Furthermore, not only were these Indian tribes dependent sovereigns, but also their sovereignty was limited by the dependent status of the Indian tribes. For example, tribes "are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status:'"[36]

> Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. Their right to complete sovereignty, as independent nations, are necessarily diminished.[37]

In other words, "the power of Indian tribes, are, in general, 'inherent powers of a limited sovereignty. . . .'"[38] Thus, the "retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order," which is that not "implicitly lost by virtue of their dependent status."[39] The status of tribes and their members and their relationship to

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[36] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

[37] *Id.* at 209.

[38] *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

[39] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

the United States is truly unique, and like no other relationship.

The Founding Fathers provided for the unique relationship between the new Republic and Indian tribes with the Commerce Clause, which distinguishes between regulating commerce by the states, with foreign nations, and "with the Indian Tribes."[40] Indeed, commerce with American Indian tribes was the exclusive province of the United States within its borders, just as was the case with Great Britain before it. Thus, the Commerce Clause perpetuates early recognition that the Indian tribes were considered "distinct political communities,"[41] but not foreign States or States of the United States. Accordingly, the Constitution provided the United States Government with the power to pass special legislation regarding these Indian tribes and their members as dependent sovereign governments within the territorial jurisdiction of the United States. Over the decades, Congress has done just that, albeit with an evolving understanding of its objective in doing so.

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[40] U.S. Const. art. I, sec. 8, cl. 3.

[41] *Worcester*, 31 U.S. at 556.

D. CONGRESS'S POWER TO DEAL WITH AMERICAN INDIAN TRIBES SPECIALLY HAS EVOLVED, BUT IS BASED FUNDAMENTALLY ON THE UNIQUE GUARDIAN-WARD TRUST RELATIONSHIP.

It is not within the scope of this writing to delineate the changes that have occurred in Congress's view of American Indian tribes, the resultant transformations of United States policy, or the impacts of those modifications on American Indian tribes. It is well known, however, that the United States Government promoted and facilitated westward expansion for the Nation's ever increasing population, which led to the removal of the Indian tribes in the East and Midwest, war with some western Indian tribes, and the Reservation Period. For example, the movement of non-Indian population westward upset the ecological patterns of the Great Plains by destroying large amounts of game, chiefly buffalo, and forced tribes to seek new hunting areas, which in turn led to intertribal conflict and sometimes attacks on and warfare with non-Indians as well. Moreover, the tribes' way of life in the western United States was destroyed.

These considerations led Congress to legislate regarding Indian tribes, not just enter into treaties, as had been the case in the Colonial Period, the 1850s, and even into the 1870s. For example, this Court, addressing the power of Congress to pass the Major Crimes Act, found that Congress had the power

to legislate regarding American Indians, subjecting them and others found on their reservations to the criminal law of the United States, due to the special relationship between Congress and American Indian tribes and the trust status of the tribes:

> From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power.[42]

Thus, this Court determined that Congress had the power to deal with American Indian tribes and their members specially, that is, outside the confines of the Constitution, because of this historic and unique trust relationship:

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[43]

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[42] *Kagama v. United States*, 118 U.S. 375, 384 (1886).

[43] *Id.* at 384-85.

Moreover, as this Court acknowledged, Congress has powers regarding American Indians under the Indian Commerce Clause and the Treaty Clause.

"American Indian policy" has been through many changes over the decades, which are well-known and may be judicially noticed by this Court, including attempts to: assimilate American Indians, provide for self determination, terminate the reservations, and preserve tribal sovereignty and self government. Each change in policy has been accompanied by various legislative enactments, all of which have treated American Indian tribes and their members as a racial group and provided special preferences for them over other racial groups. This Court's first consideration of this "extra-constitutional" classification occurred in *Morton v. Mancari*.[44]

E. *MORTON v. MANCARI* ON CONGRESS'S UNIQUE HISTORICAL AND CONSTITUTIONAL RELATIONSHIP WITH AMERICAN INDIAN TRIBES.

In *Morton v. Mancari*, a non-Indian challenged the constitutionality of Congress's inclusion, in the Indian Reorganization of Act of 1934, of a hiring preference for American Indians who sought employment with the federal Bureau of Indian Affairs (BIA). This Court, upholding Congress's power to deal

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[44] 417 U.S. 535 (1974).

specially with American Indian tribes and their members, found that Congress's purpose was simple:

> [T]o give Indians a greater participation in their own *self-government*; to further the Government's *trust obligation* toward Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect the *Indian tribal life*.[45]

Thus, "[t]he overriding purpose [of the Act] . . . was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,"[46] and thereby "strengthen tribal government. . . ."[47] Therefore, Congress's authority to adopt the preference:

> [T]urns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status to legislate on behalf of federally recognized tribes.[48]

Specifically, *Mancari* recognized that the Indian Commerce Clause,[49] in giving Congress the power to "regulate Commerce with the Indian tribes[,] . . . singles out Indians as a proper subject for separate

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[45] *Mancari*, 417 U.S. at 541-42 (emphasis added).

[46] *Id.* at 542.

[47] *Id.* at 543.

[48] *Id.* at 551 (emphasis added).

[49] U.S. Const. art. I, sec. 8, cl. 3.

legislation [by Congress]."[50] Similarly, the Treaty Clause[51] authorizes Congress to "deal with Indian tribes."[52] Finally, Congress's special relationship with Indian tribes is grounded, not just in the Constitution, but also in "historical relationships" between the United States government and American Indians and the "solemn commitment of the Government toward Indians[]":[53]

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless, and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.[54]

Therefore, the conflict between Congress's special treatment of American Indians—by enacting a hiring preference for the BIA—and the Constitution's equal protection guarantee is resolved by recognizing

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[50] *Mancari*, 417 U.S. at 552.

[51] U.S. Const. art. II, sec. 2, cl. 2.

[52] *Mancari*, 417 U.S. at 552.

[53] *Id.*

[54] *Id.*

Congress's special and unique relationship with American Indians:

> As long as the special treatment [of American Indians] can be tied rationally to the *fulfillment of Congress' unique obligation toward Indians*, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to *further Indian self-government*, we cannot say *Congress'* classification violates due process.[55]

1. *Mancari*'s Political Racial Distinction Is Not The Basis For Its Holding.

Mancari should have left it there. But the Court, quite unnecessarily, added this dicta:

> [T]his preference does not constitute "racial discrimination." It is not even a racial preference. . . . The preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities. . . . . . Here the preference is reasonably and legitimately related to a legitimate, nonracially based goal.[56]

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[55] *Id.* at 555 (emphasis added).

[56] *Id.* at 553-54.

Worse yet, the Court inserted more dicta via this footnote:

> The preference is not directed toward a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized tribes." This operates to exclude many individuals who are racially to be classified as "Indians." In this sense the preference is totally political rather than racial in nature.[57]

But *Mancari* is not grounded on such a clearly unconstitutional distinction—it is beyond dispute that tribal membership is based on race, ancestry, or descent—but instead upon Congress's unique historical trust relationship and its plenary and constitutional powers over Indians.

2. *Mancari*'s Dicta Is Without Factual Basis.

Ironically, the Indian Reorganization Act of 1934, which *Mancari* construed, does not afford a preference to "members" of "federally recognized tribes"; instead, it defines "Indian" to require either Indian blood quantum or descent from Indians, regardless of tribal membership:

> The term "Indian" as used in this Act shall include all persons *of Indian descent* who are

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[57] *Id.* at 554.

> members of any recognized Indian tribe now under federal jurisdiction; and all persons who are *descendents of such members* who were, on June 1, 1934, residing with the present boundaries of any Indian reservation; and shall further include *all other persons of one-half or more Indian blood.*"[58]

Thus, *Mancari*'s dicta is based, not on Congress's statutory definition, but on the erroneous and illegal regulation implementing the Indian preference, which, even so, included an element of race:

> An *Indian* has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an *individual must be one-fourth or more degree Indian blood and* be a member of a federally recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an *Indian* he shall be given preference in filling the vacancy.[59]

It is little wonder that, just three years after *Mancari* was decided, the BIA recognized that it could

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[58] Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (now codified as 25 U.S.C. § 479) (emphasis added).

[59] *Mancari*, 417 U.S. at 554, n. 24, citing 44 BIA Manual 335, 3.1 (emphasis added).

not alter the express definition adopted by Congress,[60] as it had in its 1974 regulation, and changed that regulation, to mirror the statute:

> For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons *of Indian descent* who are:
>
> (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
>
> (b) *Descendants of such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
>
> (c) *All others of one-half or more Indian blood* of tribes indigenous to the United States. . . .[61]

Therefore, because there is no factual basis for the political-racial distinction set forth in *Mancari*'s dicta, federal courts considering the constitutionality of preferential or discriminatory treatment of American Indian tribes or their members may not rely upon *Mancari*'s dicta.

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[60] *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) ("[W]here . . . the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.").

[61] 25 C.F.R. § 5.1 (43 FR 2393, Jan. 17, 1978) (emphasis added).

3. *Adarand* Limits *Mancari*.

Twenty-one years after *Mancari* was decided, this Court decided *Adarand Constructors v. Peña*,[62] holding that, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[63] Furthermore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[64] Finally:

> [A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[65]

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[62] 515 U.S. 200 (1995).

[63] *Id.* at 224. Justice O'Connor repeats Justice Powell's "defense of this conclusion": "When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.) (footnote omitted).

[64] *Id.* at 230.

[65] *Id.* at 227.

Thus, *Mancari* provides very little cover for special legislation for American Indian tribes and their members, much less for persons of Hawaiian ancestry. Congress's plenary power and its special relationship with Indian tribes and their members do not provide it an exemption from the Equal Protection Component of the Due Process Clause of the Fifth Amendment. The Bill of Rights explicitly protects persons from overreaching congressional regulation under Congress's other powers. Specifically, the power conferred on Congress to regulate Indian Tribes, "like the other great substantive powers of Congress, is subject to the Fifth Amendment."[66] Thus, because Congress may not protect Tribes, or any group, at the expense of an individual's constitutional rights, Congress's powers to regulate Indian Tribes are subject to strict scrutiny.

Consequently, after *Adarand*, if Congress seeks to legislate specially with regard to American Indians, it must argue that—due to the unique guardian-ward status between Congress and American Indian tribes, Congress's plenary powers over Indians, and Congress's historical relationship with American Indian tribes—it has a compelling interest to further American Indian tribes' self government and sovereignty. No other argument satisfies the Constitution's equal protection guarantee, *Adarand*, and strict

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[66] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

scrutiny, which requires that legislation be narrowly tailored to achieve a limited and compelling interest. Accordingly, Congress's powers to treat American Indian tribes and their members, much less persons of Hawaiian ancestry, in a special fashion are very limited. Moreover, because Congress has no power over or history of a relationship with Native Hawaiians, even this compelling interest is denied Congress when it seeks to legislate specifically as to persons of Hawaiian ancestry.

II. CONGRESS LACKS A COMPELLING INTEREST FOR PROVIDING PREFERENCES TO PERSONS OF HAWAIIAN ANCESTRY.

A. THE HISTORIES OF NATIVE HAWAIIANS AND AMERICAN INDIAN TRIBES ARE DISSIMILAR.

1. No European Power Colonized Or Occupied The Hawaiian Islands Under Claim Of Ownership.

Unlike the Americas, the Hawaiian Islands were never claimed by the United States or any other European nation as its own under the European law of discovery and were never colonized or occupied. Captain Cook, of Great Britain's Navy, did "discover" the islands in 1778 and found they "were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering."[67] "In 1810 the islands

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[67] *Rice v. Cayetano*, 528 U.S. 495, 500 (2000).

were united as one kingdom under the leadership of . . . Kamehameha I,"[68] by force of arms. That Kingdom was recognized diplomatically by the United States in 1826.[69] Indeed, the United States entered into several treaties, conventions, and formal arrangements with the Kingdom from 1826 through 1887.[70] Notably, in none of these treaties or agreements did the Kingdom cede land to the United States, nor did the United States promise protection, food and aid, or protection of and respect for boundaries, key features of treaties between the United States and American Indian tribes.[71]

2. The Kingdom Of Hawaii Was Not A Government For Indigenous Native Hawaiians Only.

After Cook's visit and the publication of several books relating to his voyages, the Hawaiian Islands received many European visitors—explorers, traders, and eventually whalers—many of whom stayed there. The "1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom."[72] Indeed, an "important feature of Hawaiian demographics . . . is the immigration to the islands

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[68] *Id.* at 501.

[69] Apology Resolution, P.L. 103-50, 107 Stat. 1510 (1993).

[70] *Rice*, 528 U.S. at 504.

[71] Pearl Harbor was ceded in 1887, however.

[72] *Rice*, 528 U.S. at 501.

by people of many different races and cultures."[73] Successive waves of immigration brought "Chinese, Portuguese, Japanese, and Filipinos to Hawaii."[74] Indeed, beginning in 1852, the "plantations drew to Hawaii . . . something over 400,000 men, women and children over the next century."[75] Furthermore, with the adoption of the Constitution for the Kingdom of Hawaii in 1840, the principle of equality for all under the law, not just Native Hawaiians, was established.[76]

Therefore, at the time of the Hawaiian Revolution in 1893, the Kingdom of Hawaii was a nation whose subjects represented many nationalities, races, and ethnicities. It was not a nation consisting of indigenous Hawaiians, as were the American Indian tribes at the time of the arrival of the European powers. Indeed, unlike indigenous Hawaiians, American Indian tribes maintained their identity as distinct, dependent, political communities, and as limited sovereigns, long after first contact with Europeans, an identity they retain today.

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[73] *Id.* at 506.

[74] *Id.*

[75] *Id.*

[76] 1840 Constitution of the Kingdom of Hawaii, Section 1 ("God hath made of one blood all nations of men to dwell on the earth in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands."); available at http://en.wikipedia.org/wiki/1840_Constitution_of_the_Kingdom_of_Hawaii.

By the time of the Hawaiian Revolution, there was no indigenous Hawaiian government whose subjects were indigenous Native Hawaiians. In fact, the 1900 census, taken just seven years after the Hawaiian Revolution in 1893, showed just 24 percent of persons resident in Hawaii to be either Hawaiian or part Hawaiian.[77] That is, through decades of immigration, the Kingdom of Hawaii had become a multicultural, multiethnic, and multiracial kingdom. More importantly, since 1810, there had not been a race-based government, unlike what was the case with all American Indian tribes.

Moreover, the legislature of the Kingdom of Hawaii, as composed after the Constitution of 1887, was primarily in the hands of the reform party, "which was made up largely of Hawaiian-born Americans and Europeans and [even] resident foreigners . . . [who] held most of the land and a majority of the businesses of the country," though Native Hawaiians also served side by side in the legislature with these persons.[78]

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[77] Census of 1900, Hawaii, tab 26, showing 37,656 persons as Hawaiian or part Hawaiian in a population of 154,001; available at http://www.census.gov/population/www/documentation/twps0056/tab26.pdf.

[78] Native Hawaiians Study Commission Report at p. 291 (1983). This Report was created as a result of under Title III of P.L. 96-565 (96th Congress 1980); available at http://wiki.grassrootinstitute.org/mediawiki/index.php?title=Native_Hawaiians_Study_Commission_Report. The purpose of the Commission was to "conduct a study of the culture, needs and concerns of the

(Continued on following page)

3. The Hawaiian Revolution Was Largely The Result Of The Attempt By The Monarchy To Enlarge Monarchical Power.

The critical cause of the Hawaiian Revolution was Queen Lili'uokalani's plot to revise the Constitution of 1887 and revert to the earlier Constitution of 1864, to re-empower the monarchy, and to restore powers lost to it in the Constitution of 1887.[79] Indeed, she proposed to "exercise monarchical power over the House of Nobles and limit[] the franchise to Hawaiian subjects."[80] Thus, those Hawaiian citizens, both native and Hawaiian born, opposed to the return of a more powerful monarchy, who favored a democratic form of government responded to the Queen's plans by seeking to replace the monarchy with a Republican form of government, with a view toward eventual annexation to the United States.[81] The involvement of the United States was minimal and neutral, the overthrow of the monarchy was bloodless, and not a

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Native Hawaiians." Sec. 303. The Commission published and released to the public a Draft Report of findings on September 23, 1982. Following a 120-day period of public comment, a final report was written and submitted on June 23, 1983, to the U.S. Senate Committee on Energy and Natural Resources and U.S. House of Representatives Committee on Interior and Insular Affairs.

[79] Native Hawaiians Study Commission Report at 292-93.

[80] *Rice*, 528 U.S. at 504.

[81] Native Hawaiians Study Commission Report at 293-94.

shot was fired by United States troops.[82] What involvement there was occurred without official sanction of the United States Congress or the United States Executive Branch.

A Constitution for the Republic of Hawaii was adopted on July 4, 1894.[83] Thereafter, Hawaii functioned as a fully recognized government until March 16, 1898, when, at the request of the legislature of the Republic of Hawaii, a joint resolution was passed by Congress annexing the Republic of Hawaii as a Territory of the United States.

4. The Hawaiian Revolution Did Not Diminish Native Hawaiian Rights Previously Enjoyed.

Neither the Hawaiian Revolution nor the creation of the Republic of Hawaii resulted in even an inch of land being taken from Native Hawaiians. Nor were they deprived of any other rights they held before the change in the form of government. Indeed, the land system remained much as it had before. If any apology were owed by the United States with respect to the Hawaiian Revolution, it was owed equally to Native Hawaiians and non-Native

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[82] *Id.* at 294-96.

[83] *Id.* at 299.

Hawaiians, as both were treated the same under the law by the ousted Queen Lili'uokalani.[84]

What did occur was that the multicultural subjects of the Kingdom of Hawaii replaced a monarchical government, through internal revolution, with a republican form of government and popular sovereignty, much as had the American Revolution and the French Revolution. The United States played no official role. Thus, the history of the United States Government's relationship with the Kingdom of Hawaii and its subjects bears no resemblance whatsoever to the history of the United States Government's relationship with American Indian tribes from the Colonial Period to the present.

B. CONGRESS HAS NO COMPELLING INTEREST TO DEAL SPECIALLY WITH NATIVE HAWAIIANS.

None of the factors that this Court has considered critical for Congress to deal specially with American Indian tribes and their members—factors that have provided Congress arguably with a "compelling interest" for enacting such special legislation—exists as to Native Hawaiians:

- Native Hawaiians have not been the exclusive subjects or members of any

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[84] See generally, Hawaiian Kingdom Constitution of 1887; available at http://www.hawaii-nation.org/constitution-1887.html.

sovereign nation since 1810; rather, they have been subjects of a King in a diplomatically recognized Kingdom, as were the many non-Hawaiian subjects of that Kingdom.

- Native Hawaiians have never been subjected to the authority of any occupying foreign power, including the United States, that claimed ownership of their land, leaving them with only possessory rights.
- Native Hawaiians have not ceded vast portions of their land to the United States or any other foreign power, nor in any way have been removed from their lands by treaty or by force of arms. In fact, the United States has never taken land from Native Hawaiians, by force, by treaty, or otherwise, nor did the Hawaiian Revolution take lands from Native Hawaiians.
- Native Hawaiians have never been promised, as a result of a treaty with the United States, protection from incursions by other foreign powers or from other non-Native groups of people in Hawaii.
- Native Hawaiians have never been warred against by the United States, nor has the United States fired a single shot at Native Hawaiians.
- Native Hawaiians have not been victimized by actions of the United States in

which the United States, through occupation of the territory of Native Hawaiians, destroyed the ecology of their land, took their means of sustenance, or removed them to enclaves and reservations, and thus reduced them to a state of total pupilage and dependency. Therefore, Native Hawaiians have not needed protection against the selfishness of others and their own improvidence.

- Native Hawaiians were never the exclusive members of a sovereign entity, nor were they ever dependent on the United States for the supply of their essential wants. Indeed, since 1810, Native Hawaiians, as an identifiable group, have not had any sovereignty of any sort.
- Native Hawaiians are not now nor have they ever been in a guardian-ward relationship with the United States that grew out of their historical relationship with the United States.
- Native Hawaiians have never been recognized by the United States as a separate sovereign people or government, nor may Congress constitutionally recognize Native Hawaiians as a sovereign, politically distinct community.
- Native Hawaiians have never entered into a treaty with the United States; in fact, the treaties into which the United States entered—pursuant to the Foreign Nation Clause of the Commerce Clause,

not the Indian Commerce Clause—were with the Hawaiian Kingdom and were applicable with equal force to the Kingdom's subjects, who were persons of many national origins and ethnicities, including Native Hawaiian.

- Native Hawaiians can point to no enumerated constitutional power provided to Congress by which it may deal specially with Native Hawaiians.
- Native Hawaiians have never been subjected to any plenary authority by Congress, nor does Congress have such constitutional authority.
- Native Hawaiians have not been a distinct political community since before 1810.

Thus, the requisite basis for Congress to claim a compelling interest to act specially with regard to Native Hawaiians, even in the limited fashion allowed by *Mancari*, does not exist with respect to Native Hawaiians. That they are indigenous peoples to the Hawaiian Islands, and that their numbers have been reduced over the years, or that they may otherwise be in need of special aid and assistance fails to provide Congress with a compelling interest to act specially toward the racial group to which they belong, any more than it does for any other disadvantaged racial or ethnic group.

C. CONGRESS MAY NOT CREATE A GUARDIAN-WARD RELATIONSHIP WITH NATIVE HAWAIIANS BY SIMPLY DECLARING THAT ONE EXISTS.

Congress apparently believes it may subvert the limitations placed on its actions by equal protection principles and navigate an end run around the Constitution. Congress believes it may provide preferences to Native Hawaiians by simply declaring a special, unique, guardian-ward trust relationship with them even though there is no legal or factual basis to do so. Under this theory, Congress could favor any group of people, including African Americans, Hispanic Americans, Asian Americans, and any other group, by simply declaring a special trust relationship. Indeed, *Adarand* and the requirements of the Due Process Clause of the Fifth Amendment could be thwarted easily in this way.

The guardian-ward status of American Indian tribes and their members arises from the facts set forth above and arises as a matter of law, determined by this Court, and based on the Constitution and historical relationships between Congress and American Indian tribes. Congress may not, in the absence of such a historical record, simply declare such a relationship at any time it chooses, based on what it perceives as past societal wrongs, and then adopt racial preferences for a group. That would render the Equal Protection Clause meaningless.

III. THE ONLY CONSTITUTIONAL BASIS FOR SPECIAL TREATMENT FOR NATIVE HAWAIIANS IS TO REMEDY RACIAL DISCRIMINATION.

The Constitution provides that governments may use racially discriminatory preferences only to remedy "extreme" cases of "systematic" patterns of deliberate racial discrimination so as to "break down patterns of deliberate exclusion,"[85] caused by "pervasive, systematic, and obstinate discriminatory conduct."[86] Even then, however, racial remedies may be used only as a matter of "last resort"[87] because they are "the strongest of medicines" "reserved for those severe cases that are highly resistant to conventional treatment."[88] Racial preferences are proper only as "a remedy for intentional discrimination. . . ."[89] Thus, only extreme cases of pervasive, systematic and obstinate discriminatory treatment justify such a drastic remedy.

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[85] *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 509 (1989).

[86] *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000).

[87] *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 893 F.Supp. 419, 424 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996); *Croson*, 488 U.S. at 519 (Justice Kennedy concurring).

[88] *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997).

[89] *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir. 2001).

A. IN ITS APOLOGY RESOLUTION, CONGRESS DID NOT MAKE THE FINDINGS REQUIRED BY THIS COURT.

"[R]acial characteristics . . . seldom provide a relevant basis for disparate treatment, and "classifications based on race are . . . harmful to the entire body politic."[90] Therefore, because "our history [of societal discrimination] will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a 'piece of the action' for its members,"[91] government must "identify" the invidious discrimination to be remedied "with some specificity before [it] may use race-conscious relief."[92] These findings must be detailed sufficiently to "define both the scope of the injury and the extent of the remedy necessary to cure its effects."[93] "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."[94] "Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the court should not uphold" a racially discriminatory statute because "[r]acial classifications are simply too pernicious to

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[90] *Croson*, 488 U.S. at 505.

[91] *Id.* at 510-511.

[92] *Id.* at 504.

[93] *Id.* at 509.

[94] *Id.* at 510.

permit any but the most exact connection between justification and classification."[95]

In its Apology Resolution, Congress did not set forth a strong basis in evidence of such discrimination, or passive participation in such discrimination, by the United States. Its only "evidence" was of generalized societal discrimination.

B. SOCIETAL DISCRIMINATION IS NOT A COMPELLING INTEREST.

Societal discrimination is insufficiently particular in source, scope, nature, or impact to "define both the scope of the injury and the extent of the remedy necessary to cure its effects."[96] Accordingly, this Court and the circuit courts have rejected it as a compelling interest. "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[97] "[S]ocietal discrimination . . . ha[s] little or no probative value in supporting enactment of a race-conscious measure."[98] "Societal discrimination is insufficient and over expansive [and] . . . could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the

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[95] *Adarand 1995*, 515 U.S. at 229.

[96] *Croson*, 488 U.S. 509.

[97] *Id.* at 497 (quoting *Wygant*, 476 U.S. at 498).

[98] *Rothe Development Corporation v. United States Department of Defense*, 262 F.3d 1306, 1306 (Fed. Cir. 2001).

future."[99] "A 'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination.'"[100] "Race-based preferences cannot be justified by reference to past 'societal discrimination'. . . ."[101]

In its Apology Resolution, Congress's only evidence was of generalized societal discrimination, which fails to provide Congress with a compelling interest.

C. SOCIETAL DISCRIMINATION REMEDIES CAN NEVER BE NARROWLY TAILORED.

Compelling interest and narrow tailoring are "hand-in-glove" concepts, depending upon and interacting with each other. Only strong evidence of a widespread pattern of particularly identified, purposeful discrimination, so severe that only race-conscious relief can cure it, may serve as a compelling interest. Moreover, that same strong evidence must demonstrate the scope of the narrowly tailored remedy necessary to eliminate the identified discrimination and its impact. This remedy must bear the most exact connection to the identified discrimination.

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[99] *Middleton v. City of Flint, Michigan*, 92 F.3d 396, 403 (6th Cir. 1996) (quoting *Wygant*, 476 U.S. at 276, and *Croson*, 488 U.S. at 497).

[100] *Engineering Contractors*, 122 F.3d at 907.

[101] *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996).

So long as economic and social differences exist in society, societal discrimination will have an impact and will create disproportionately difficult barriers for individuals socially or economically less well off than others. Therefore, there is no narrowly tailored remedy for societal discrimination, the impacts of which are "ageless in their reach into the past and endless in their ability to affect the future."[102]

In its Apology Resolution, Congress sought to remedy the impacts of generalized societal discrimination; therefore its remedy can never be narrowly tailored.

CONCLUSION

If the Apology Resolution is construed to impose on the State of Hawaii a trust on its own land for the benefit of persons of Hawaiian ancestry, then the Resolution is unconstitutional because it violates the Equal Protection Component of the Due Process Clause of the Constitution. The Resolution cannot survive strict scrutiny. Congress can offer no compelling interest to justify such action. Although Congress may claim it has a compelling interest, due to the alleged similarities of Native Hawaiians to American Indian tribes and their members, it does not. It has no relationship to persons of Hawaiian ancestry

[102] *Wygant*, 476 U.S. at 276; *Croson*, 488 U.S. at 497.

except as they may be citizens of the United States. Neither can it demonstrate, by a strong basis in evidence, that the United States has discriminated actively or passively against persons of Hawaiian ancestry in such a manner that a race-conscious remedy is justified. In fact, the only discrimination to which Congress could point is societal discrimination, which does not supply a compelling interest, and as to which a narrowly tailored remedy is impossible.

Therefore, this Court must reverse the Supreme Court of Hawaii and construe the Apology Resolution as having no legal affect whatsoever, much less providing preferences for persons of Hawaiian ancestry. If this Court should affirm the Supreme Court of Hawaii's view of the Apology Resolution, it must hold that the Resolution is an unconstitutional violation of the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
2009
OFFICE OF THE CLERK

No. 07-1372

In The
Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Hawaii

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii strips the State of Hawaii of its authority to sell lands ceded to it by the federal government until it reaches a political settlement with Native Hawaiians about the status of those lands.

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BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

The National Congress of American Indians respectfully submits this brief as *amicus curiae* in support of respondents.

INTEREST OF *AMICUS CURIAE*

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native Organization in the United States, representing over 250 Indian nations, tribes, and village governments. NCAI is dedicated to improving the welfare of all indigenous peoples in the United States, to enlightening the public toward a better understanding of indigenous peoples, and to preserving inherent indigenous rights. Native Hawaiians are an indigenous people with whom the United States has a special relationship and are entitled to certain inherent rights which flow from their status.

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[1] Letters from the parties consenting to the filing of briefs by *amici curiae* have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The decision below temporarily precludes petitioner the State of Hawaii from transferring certain ceded lands to any third party until specific preexisting claims against those lands by Native Hawaiians are resolved through the political process. These lands had been ceded from Hawaii to the United States, shortly after the overthrow of the Hawaiian government in 1893, to be held by the United States in trust for the benefit of the Hawaiian people, *see* Hawaiian Annexation Joint Resolution, Res. No. 55, 30 Stat. 750 (1898). Upon Hawaii's admission to statehood in 1959, the lands were ceded to the State of Hawaii to be held by the State in trust to benefit, among other purposes, Native Hawaiians, *see* Hawaii Statehood Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). Native Hawaiians have never relinquished their claims to those lands.

I.

Petitioners contend that the decision below by the Supreme Court of Hawaii to stay the transfer of the ceded lands pending the political resolution of the land claims was based on the federal Apology Resolution, a recent apology by Congress for the United States' role in the overthrow of the Hawaiian government. *See* Joint Resolution to Acknowledge the 100th Anniversary of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

Some of petitioners' *amici* attempt to interject at this late date a new issue of significant import in the instant case: whether the Apology Resolution violates the equal protection component of the Due Process Clause of the Fifth Amendment. These *amici* contend that if the Apology Resolution justifies the ruling below, that Resolution must be unconstitutional because it thereby provides a benefit to Native Hawaiians on the basis of their race in violation of equal protection.

That issue, however, is not before this Court and should not be addressed in this case. Neither the question presented nor the petition for a writ of *certiorari* includes any equal protection argument. Moreover, nothing in the Supreme Court of Hawaii's ruling below creates any preference in the ceded lands for Native Hawaiians that might implicate equal protection. Rather, the state court explicitly held that it was not deciding whether Native Hawaiians possess any entitlement to the ceded lands, and ordered only that the *status quo* be maintained until resolution of the Native Hawaiians' claims to the ceded lands.

More significantly, the Court should refrain from addressing *amici*'s equal protection argument because resolution of that issue would require this Court to decide the important predicate question of whether the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, which authorizes Congress to regulate

commerce with the Indian tribes, applies to Congress' dealings with Native Hawaiians. This Court previously has declined to resolve this issue which it believed "raise[d] questions of considerable moment and difficulty" that remain "a matter of some dispute." *Rice v. Cayetano*, 528 U.S. 495, 518 (2000).

II.

Should this Court decide to address *amici*'s equal protection argument, it is plain from the Constitution and this Court's precedent that any preference in favor of Native Hawaiians created by the Apology Resolution (although there is none) must be examined in the context of Congress' power to regulate the Nation's relationship with Indian tribes.

Throughout this Nation's history, Congress has used its authority under the Indian Commerce Clause to enact laws affecting all indigenous peoples within the then-current boundaries of the United States and this Court has deferred to the political branches in every instance. *The Kansas Indians*, 72 U.S. 737 (1867); *United States v. Holliday*, 70 U.S. 407, 419 (1866). While this deference is not absolute, it is subject only to this Court's oversight to ensure that no arbitrary characterization is made simply to bring a group or community under this power. *See United States v. Sandoval*, 231 U.S. 28, 47 (1913). There can be no dispute that Native Hawaiians constitute just such an indigenous people.

III.

The federal government's dealings with the indigenous peoples of the United States has created a "special relationship" with them which insulates from equal protection challenge legislation dealing with those peoples "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This rule applies whether the legislation deals with members of a federally recognized tribe or not. *See, e.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). The Apology Resolution and other legislation that is tied to Congress' obligation toward Native Hawaiians thus are not subject to strict scrutiny and need only be rationally related to the unique obligations Congress has to the indigenous people of Hawaii.

ARGUMENT

I. THE QUESTION OF WHETHER LAWS THAT BENEFIT NATIVE HAWAIIANS VIOLATE EQUAL PROTECTION IS A QUESTION THAT IS NOT BEFORE THIS COURT AND SHOULD NOT BE ADDRESSED IN THIS CASE

A number of *amici curiae* in support of petitioners attempt to interject a constitutional issue of equal protection that is of considerable import but is not before the Court. *See, e.g.*, Br. of Pacific Legal Foundation et al.; Br. of Mountain States Legal

Foundation. The Court should not use this case to decide that equal protection question.

A. Rather than focus on the narrow and straightforward question presented by petitioners on which this Court based its grant of *certiorari*, certain *amici* seek to abolish all programs of respondent the Office of Hawaiian Affairs (OHA) and of petitioner the State of Hawaii, that "treat 'native Hawaiians' and 'Hawaiians' as different classes." Br. of Pacific Legal Foundation et al. 3; Br. of Mountain States Legal Foundation. These *amici* "argue that Hawaii, once and for all, is required to abandon" these congressionally authorized distinctions. Br. of Pacific Legal Foundation et al. 3; Br. of Mountain States Legal Foundation. These *amici* contend that the equal protection component of the Fifth Amendment precludes Congress from enacting any legislation that might favor Native Hawaiians over others. They argue that the Supreme Court of Hawaii's decision construing the Apology Resolution in this case creates such a preference for Native Hawaiians which must be reversed on that constitutional ground.

The argument that the federal Apology Resolution (or the programs of the OHA or the State) violates equal protection, however, is not included in the question presented, or anywhere else in the *certiorari* petition. Petitioner raised only the narrow question of whether the Apology Resolution temporarily precludes the transfer of ceded lands until there is a political resolution of ownership of those lands as amongst the United States, the State,

and Native Hawaiians. As such, the issues *amici* now ask this Court to resolve are not properly before the Court and should not be addressed. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); S. Ct. R. 14.1(a).

Amici should not be permitted to expand the questions presented in the case. *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (noting that the Court will not "ordinarily address issues raised only by *amici*"); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981) (same). This Court has made clear that "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Petitioners also did not raise the *amici*'s equal protection argument below, so the state court did not have an opportunity to address the constitutional issue. This Court's practice is to refrain from addressing issues that have not been raised or addressed below. *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).

Moreover, petitioners affirmatively represented to this Court at the *certiorari* stage that "[t]he parties have not addressed, and this case does not present, * * * constitutional challenges * * * to governmental programs directed to native Hawaiians." Pet. Cert. Reply 9-10 n.4. And, in their briefs on the merits, petitioners, respondents, and the United States as

amicus curiae all have explicitly disavowed that the equal protection issue is before the Court. *See* Pet. Br. 27 n.16; Resp. Br. 7 n.2; U.S. Br. 22 n.3.

B. In any event, contrary to these *amici*'s contentions, the constitutional question they pose is not raised by the facts of this case because nothing in the Supreme Court of Hawaii's opinion creates a preference for Native Hawaiians that implicates equal protection.

The court below did not grant respondents, or Native Hawaiians generally, any additional rights to the ceded lands. Rather, the state court ordered an injunction to maintain the *status quo* "until the claims of the native Hawaiians to the ceded lands have been resolved." Pet. App. 100a. The Hawaii court explained:

> The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved. The important distinction here is that this Court is *not* being asked to decide whether native Hawaiians are *entitled* to the ceded lands.

Pet. App. 79a.

The court "agree[d] with [respondents] that the 'Apology Resolution by itself does not require the

State to turn over the [ceded] lands to the [n]ative Hawaiian people[.]'" Pet. App. 32a (brackets in original). The Court below explained that "the Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims." *Ibid.*

The *amici* disregard this actual rationale of the state court, however. They seek from this Court an advisory opinion to indicate that, if the United States and the State of Hawaii ultimately decide that Native Hawaiians have a right to the ceded lands, such a future decision would violate equal protection. Such an advisory opinion would violate the limits of Article III.

C. This is not a case where any exceptional circumstances militate in favor of this Court reaching beyond the question presented and what was presented to and addressed by the state court below. *Cooper Industries, Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927). *Amici*'s challenge to the authority of respondent OHA or Congress (or even petitioner the State of Hawaii) to implement programs that exclusively benefit Native Hawaiians (*amici*'s ultimate grievance to this Court, *see* Br. of Pacific Legal Foundation et al.) can be raised in a different case that directly challenges such programs. Should Native Hawaiians ultimately prevail through the political process and gain full title to the ceded lands at issue in this case, that decision will almost

certainly be subject to judicial review and constitutional challenges by parties more directly affected.

Moreover, the equal protection arguments that *amici* raise are highly contested and cannot be easily resolved as they now are presented to this Court. This is so because *amici*'s equal protection challenge requires the Court to resolve a predicate "proposition" as to whether "Congress may treat the native Hawaiians as it does the Indian tribes," *Rice*, 528 U.S. at 518, so that Congress can enact "legislation dedicated to their circumstances and needs." *Id.* at 519. Such legislation—including the Apology Resolution (as *amici* read it) and the programs *amici* more generally challenge—need only be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555).

The Court has described that predicate "proposition[ ]"—*i.e.*, whether Native Hawaiians may be treated like Indian tribes—to "raise questions of considerable moment and difficulty" that ultimately remain "a matter of some dispute." *Id.* at 518. Although a detailed analysis demonstrates that Native Hawaiians can be constitutionally treated by Congress like Indian tribes, this Court in *Rice* intentionally "stay[ed] far off that difficult terrain," *id.* at 519, that *amici* now unnecessarily ask the Court to address.

As such, even if it were possible to resolve *amici*'s constitutional arguments in this case, the Court should await a case in which the issues were litigated and addressed in the court below and were presented in the *certiorari* petition and fully briefed by the parties before this Court. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 164-165 (2007) ("Although [petitioner] is doubtless correct that we could consider the question of what standard applies as anterior to the question whether the standards may differ, the issue of the substantive content of the causation standard is significant enough that we prefer not to address it when it has not been fully presented"; it would be "unfair" to allow petitioner to "switch gears.").

II. THE CONSTITUTION CONFERS ON CONGRESS THE AUTHORITY TO REGULATE THE NATION'S AFFAIRS WITH ALL INDIGENOUS PEOPLES OF THE UNITED STATES

In the event this Court deems it necessary to address the equal protection question now inappropriately posed by *amici curiae*, the Court still should affirm the state court ruling below. At bottom, the equal protection arguments raised by various of petitioner's *amici* are without merit because those arguments ignore this Court's well-settled precedent that a law which explicitly targets the indigenous peoples of the United States, such as Native Hawaiians, need be only rationally related to Congress' unique obligations to those peoples.

A. Consistent With The Purpose And History Of The Indian Commerce Clause, Congress Has Properly Determined That Its Obligations And Unique Legislative Authority With Respect To "Indian Tribes" Includes Native Hawaiians

Amici contend that Congress cannot enact or approve any laws that explicitly benefit Native Hawaiians. As such, *amici* argue, in the broadest sense, that the indigenous inhabitants of Hawaii fall outside the scope of the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and are not an indigenous people with whom the federal government may separately deal on a political basis.

Amici reach this result by adopting a hypertechnical and restrictive reading of the term "Indian tribes" in the Indian Commerce Clause as not including those who are neither "Indians" nor organized into "tribes," such as the indigenous people of Hawaii. This reading of the Indian Commerce Clause is inconsistent with Congress' prior construction of the Clause throughout this Nation's history.

1. The Constitution's use of the term "Indian tribes" in the Indian Commerce Clause is the result of the Framer's decision to label as "Indians" all the indigenous peoples of North America with whom they were then familiar and to categorically denominate all the political organizations of those peoples as "nations" or "tribes" regardless of the many

distinctions between those various peoples and their organizations. *See* Harold E. Driver, *Indians of North America* 299-302 (2d ed. 1969). The reference to Indian tribes in the Indian Commerce Clause thus was a reference by the Framers to all those peoples who are Native to North America rather than to any particular ethnicity, culture or political organization actually inherent in those indigenous peoples.

This decision by the Framers can be traced to Columbus's landing in the "New World" in 1492. Because Columbus believed he had arrived in his intended destination of Asia, he referred to the indigenous peoples he encountered as "los Indios"—the Indians. *See* Robert F. Berkhofer, Jr., *The White Man's Indian* 4-5 (1978). Far from being a handful of homogenous and identical Indian tribes, however, as Columbus and other Europeans first believed, these "first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies." *Id.* at 3. All these various indigenous peoples "practiced a multiplicity of customs and lifestyles, held an enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to the many speakers, and did not conceive of themselves as a single people—if they knew about each other at all." *Ibid.* The different indigenous peoples did not share a singular, or even similar, political structure and culture, but Columbus "categorized the variety of cultures and societies as a single entity for the purposes of description and analysis." *Ibid.*

It is against this backdrop that the use of the term "Indian tribes" in the Constitution's Indian Commerce Clause must be understood. It is a term to broadly encompass all the indigenous peoples of North America. The Framer's use of the term reflects the common sense interpretation of Indian tribes to encompass the full diversity among the indigenous peoples of the United States.

That approach is in accord with the fact that the ultimate geographical limits of the United States were unknowable at the time of the Founding, as were the variety of indigenous peoples that occupied the Americas. *See* Driver, *supra*, at 287-308. Subsequent to the adoption of the Constitution, the United States continued to encounter indigenous peoples who were not ethnically "Indian" and whose organizational structures differed from those of eastern "tribes." The Constitution nonetheless was found to encompass, without question, the relations with all indigenous peoples within the geographic limits of the United States.[2] *Weems v. United States*, 217 U.S. 349, 373 (1910).

Accordingly, Native Hawaiians are included in the indigenous peoples covered by the Indian Commerce Clause. It is undisputed that prior to

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[2] This is true even in the case of a tribe that came into the United States from a foreign country. *See* 25 U.S.C. § 495 (establishing a reservation in Alaska for the Metlakatla Tribe which came into the United States from Canada).

discovery in 1778, Native Hawaiians inhabited the islands for centuries. *See Rice*, 528 U.S. at 500. Their status as an indigenous people within the United States in and of itself is enough to classify them as an "Indian tribe" under the Constitution, because, as discussed above, that term necessarily encompasses a wide-variety of peoples who often shared only the characteristics of being foreign to European explorers and being indigenous to lands that would become the United States.

2. Consistent with this longstanding historical approach, Congress has concluded that Native Hawaiians fall within the scope of the Indian Commerce Clause.

Congress has repeatedly and unequivocally explained that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. § 11701(17) (findings for federal law relating to Native Hawaiian health care); *see also* 42 U.S.C. § 11702(a) ("The Congress hereby declares that it is the policy of the United States in fulfillment of its special responsibilities and legal obligations to the indigenous people of Hawaii resulting from the unique and historical relationship between the United States and the Government of the indigenous people of Hawaii."). And Congress has explained that "Congress does not extend service to Native Hawaiians because of their race, but because of their

unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship." Pub. L. 106-569, title V, § 512(13)(B), 114 Stat. 2966, 2968 (2000).

Congress has used its authority under the Indian Commerce Clause to include Native Hawaiians in numerous other federal laws relating to Indian tribes. For example, in the Native American Languages Act, 25 U.S.C. § 2902(1), Congress has defined "[t]he term 'Native American' [to] mean[ ] an Indian, Native Hawaiian, or Native American Pacific Islander." *Ibid.*[3]

B. The Court Has Consistently Deferred To Congress' Determination As To The Scope Of The Indian Commerce Clause

As discussed above, Congress has already determined, in numerous legislative contexts, that the Indian Commerce Clause includes Native Hawaiians. Under this Court's longstanding precedents, such decisions are subject to considerable deference. This Court has never overturned—after facing the issue in a variety of contexts—a congressional decision to recognize an indigenous people or category of peoples. This Court has deferred to such congressional determinations irrespective of

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[3] For a more comprehensive listing of legislation treating Native Hawaiians the same as Indians, *see* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 106 n.67 (1998).

whether or not the indigenous peoples at issue had dissimilar land tenure, political organization, or ethnic composition to the "traditional" Indian tribes within the territorial United States at the time of the Founding.

1. The Court has not required any particular historical land tenure or ownership criteria in order for the Indian Commerce Clause to apply

Contrary to some of *amici*'s contentions, *see* Br. of Mountain States Legal Foundation 24-25 (noting that no European power colonized or occupied Hawaiian Islands), this Court has not required any specific historical land tenure or ownership criteria in order for an indigenous people to be treated as an Indian tribe, but instead has deferred to Congress' determination. In *United States v. Sandoval*, for example, the Court addressed whether the land of the Santa Clara Pueblo was Indian country for purposes of federal jurisdiction—*viz.*, whether the Pueblo came within the meaning of the Indian Commerce Clause. *See* 231 U.S. at 38. The Pueblo, unlike nomadic Indians, was a sedentary and agricultural people. Rather than have its lands held in public trust by the United States, the Pueblo owned its land in communal fee simple under grants from the King of

Spain which were confirmed by Congress.[4] *See id.* at 39-40.

This Court concluded that any such distinction of land ownership between the Pueblo and other Indian tribes was of no moment. The Court held that the Pueblo land held in fee simple could be subject to Congress' jurisdiction under the Indian Commerce Clause as much as other public lands reserved for Indian tribes. The Court explained that Congress could exercise jurisdiction over "all dependent Indian communities within its borders, whether within its original territory or *territory subsequently acquired*, and whether within or without the limits of a State," *id.* at 46 (emphasis added), and the Court concluded that such determinations were within the province of Congress rather than the courts. *Id.* at 46 (holding that "the questions whether, to what extent, and for what time [indigenous people] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts").[5]

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[4] The members of the Pueblo also made a claim to citizenship. *See Sandoval*, 231 U.S. at 48. The claim to citizenship was not passed upon because the Court felt that "citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people." *Ibid.*

[5] The *Sandoval* Court followed longstanding precedent in granting deference to the political branches in these matters.

(Continued on following page)

2. The Indian Commerce Clause applies to indigenous peoples irrespective of their political organization

Amici also are wrong that Native Hawaiians should be excluded from the general rules of Indian law because they lack a political organization similar to the indigenous groups first encountered in North America. Br. of Mountain States Legal Foundation 26-27.

a. Many Indians are members of political entities that are very different from those of the eastern tribes. *See* Driver, *supra*, at 287-308. As this Court has recognized, some Indians had "little or no tribal organization." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979). Indeed, in California, "tribes" in the political sense may not have existed at all. *See* Driver, *supra*, at 295. Courts thus have recognized that "[t]ribe is most appropriately a cultural concept. Except for some eastern woodland confederacies, few Indians had tribal organizations that governed their activities." *United States v. Washington*, 641 F.2d 1368, 1373 n.6 (9th Cir. 1981) (quoting Graham D. Taylor, *The New Deal and American Indian Tribalism* 2 (1980)); *see also Elser v. Gill Net Number One*, 246 Cal.App.2d 30, 38, 54 Cal. Rptr. 568, 575 (1966) (explaining that when applied to California Indians,

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United States v. Holliday, 70 U.S. 407 (1866); *The Kansas Indians*, 72 U.S. 737 (1867).

the term tribe must be understood as synonymous with ethnic group rather than as denoting political unity because tribes in a political sense did not exist in California.)

As this Nation expanded westward, the United States came in contact with indigenous peoples who lacked the political organization characteristic of the eastern tribes. That absence of tribal organization, of course, did not impede any federal dealings with those peoples as Indian tribes. To the contrary, "the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties." *Fishing Vessel Ass'n*, 443 U.S. at 664 n.5. Congress even "created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages."[6] Felix S. Cohen, *Handbook of Federal Indian Law* 6 (1982 ed.) [hereinafter Cohen, 1982 *Handbook*]. For example, "the Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for

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[6] "Examples are the Wind River Tribes (Shoshone and Arapahoe), the Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees, Delawares, Shawnees and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation." Cohen, 1982 *Handbook*, at 6 (citations omitted).

purposes of their relationships with the United States." *Washington v. Yakima Nation*, 439 U.S. 463, 469 (1979). These 14 tribes signed a treaty with the United States in "which it was agreed that the various tribes would be considered 'one nation' and that specified lands * * * would be set aside for their exclusive use." *Ibid.*[7]

b. Moreover, even where tribal status was absent, Congress has legislated as to groups of indigenous peoples. The Indian Claims Commission Act (ICCA) was passed to provide a remedy for many of the injustices suffered by the indigenous peoples of the United States. The Act provided that, "[t]he Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska * * * ." Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1050 (1946).

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[7] "On the other hand, Congress has sometimes divided a single tribe, from the ethnological standpoint, into a number of tribes or 'bands.'" Cohen, 1982 *Handbook*, at 6; *see also United States v. John*, 437 U.S. 634 (1978) (Choctaws remaining in Mississippi after most moved west); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Delaware Tribe divided into 'Kansas Delawares' and 'Absentee Delawares'); *United States v. Boyd*, 83 F. 547 (4th Cir. 1897) (Eastern Band of Cherokees in North Carolina a 'tribe' even though main body of tribe had moved to Oklahoma).

The Justice Department, charged with defending these claims, initially argued that to fall within the ICCA, any group had to "possess the characteristics of a 'tribe' or 'band,' which are, mainly, a common government or leadership, continuity of existence and concert of action." *Loyal Creek Band or Group of Creek Indians v. United States*, 1 Indian Cl. Comm. 122, 127 (1949). The Commission and Court of Claims, however, rejected the government position and held that if the "group can be identified and it has a common claim it is * * * an 'identifiable group of American Indians'" and can bring a claim under the ICCA. *Id.* at 129; *see also Peoria Tribe v. United States*, 169 Ct. Cl. 1009 (1965); *Nooksack Tribe v. United States*, 162 Ct. Cl. 712 (1963), *cert. denied*, 375 U.S. 993 (1964).[8]

In short, federal dealings with indigenous peoples within the United States have never depended upon their organization into tribes. *Amici*'s

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[8] Congress also has imposed obligations on newly formed bands of Indians even though individual members came from different tribes. The Indian Depredations Act of 1891 gave to the Court of Claims jurisdiction over "[a]ll claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for." Act of Mar. 3, 1891, ch. 538, § 1, 26 Stat. 851, 851-852. In *Montoya v. United States*, 180 U.S. 261, 269-270 (1901), this Court held that the statute extended to members of a hostile band of Indians even though the members of that band came from different tribes and did not themselves constitute a new tribe.

attempt to distinguish the situation in Hawaii because of the absence of a political structure resembling that of a tribe should be rejected.

3. This Nation's relationship with Native Alaskans demonstrates that the Indian Commerce Clause applies to all indigenous peoples within the United States

Amici contend that the Indian Commerce Clause should not apply to Native Hawaiians because they comprise many distinct ethnic backgrounds and are culturally and politically distinct from the indigenous people of the rest of the United States. Br. of Mountain States Legal Foundation 26-27. As discussed above, certain heterogeneity in Indian tribes was not uncommon due, in part, to federal efforts to sometimes combine smaller groups of indigenous peoples. *See supra*, at 21. Moreover, the false idea that "Indian" refers to a single, distinct ethnicity was put to rest when Congress concluded that native Alaskan groups fall within the Indian Commerce Clause.

After the United States acquired Alaska from Russia in the 1867 Treaty of Cession, that treaty was construed to give "the Indian tribes of Alaska the same status before the law as those of the United States." *In re Naturalization of Minook*, 2 Alaska 200, 221 (D. Alaska 1904); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 402 (1942 ed.)

[hereinafter Cohen, 1942 *Handbook*].[9] Native Alaskans, however, include Eskimos who are distinct from Alaska's two other native groups, Indians and Aleuts. Cohen, 1942 *Handbook*, *supra*, at 401. The question thus arose whether Eskimos could be subject to the same principles as Indians in the continental United States.

The Department of Interior Solicitor's Office concluded that Eskimos were properly treated as Indians under federal law. In 1932, the Department of Interior Solicitor submitted to Congress an Opinion on the "Status of Alaska Natives." *See* 1 Op. Solicitor on Ind. Affairs 303 (1932). The 1932 Opinion concluded that:

> [I]t is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not *as they are all wards of the Nation, and their status is in material*

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[9] Other decisions from that era analogizing the legal status of Alaska Natives to that of Indians generally include *Nagle v. United States*, 191 F. 141 (1911) (Native Alaskans eligible for General Allotment Act citizenship provision) and *United States v. Berrigan*, 2 Alaska 442 (D. Alaska 1905) (describing the United States' relationship to Native Alaskans as that of "guardian" to "dependent ward" and prohibiting disposition of Native land to non-natives without federal approval).

> *respects similar to that of the Indians of the United States.*

Id. at 310 (emphasis added).

This opinion remains unchallenged. There has never been a suggestion that the exercise of federal power over native Alaskans runs afoul of the Indian Commerce Clause. Rather, this Court in *Alaska v. Native Village of Venetie Tribal Government* recognized Congress' power over Alaska Natives by stating that "[w]hether the concept of Indian country should be modified is a question entirely for Congress." 522 U.S. 520, 534 (1998). Those same principles should apply with equal force to Native Hawaiians.

III. Legislation Based On Congress' Unique Obligations To Native Hawaiians Is Not Subject To Heightened Scrutiny

Amici assert that "Indian tribes * * * enjoy a 'unique legal status' under federal law and upon the plenary power of Congress." Br. of Pacific Legal Foundation et al. 24. That assertion by *amici* should be fatal to their equal protection challenge because, as demonstrated above, Congress may treat Native Hawaiians like Indian tribes and such legislation must be reviewed in the same manner as legislation regarding Indian tribes.[10]

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[10] *Amici* suggest that all they seek is equality and that recognizing the rights of indigenous peoples somehow tramples

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Acting pursuant to its authority under the Indian Commerce Clause, Congress has, through extensive legislation and course of dealings, established a "special relationship" with the indigenous peoples of the United States, including Native Hawaiians. *See supra*, at 16-17. This special relationship protects such legislation from the heightened scrutiny that applies to race-based legislation. *See Mancari*, 417 U.S. at 553-554.

A. This Court In *Morton v. Mancari* Held That Preferential Treatment For Indian Tribes Must Not Be Disturbed So Long As It Is Rationally Related To Congress' Unique Obligations To Indians

In *Mancari*, this Court rejected the equal protection challenge of non-Indian employees to the Bureau of Indian Affairs' (BIA) employment preference for Indians, which was authorized by the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. §§ 461-479 (1994). *See Morton v. Mancari*, 417 U.S. at 538-539.

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on the rights of others. Not only has Congress rejected this view, but so too does the rest of the world. On September 13, 2007, the United Nation's General Assembly, by a vote of 143 in favor, 4 opposed, and 11 abstaining, adopted the Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007), affirming the sovereign rights of indigenous peoples.

The Court rejected the notion that the preference was granted to "Indians * * * as a discrete racial group" subject to strict scrutiny. *Id.* at 554. Rather, the Court noted that the preference was applied to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Ibid.* Accordingly, the Court held that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

The Court recognized two constitutional bases for this result. First, the Constitution "singles Indians out as a proper subject for separate legislation," in article I, section 8, clause 3, which provides Congress with the power to "regulate Commerce * * * with the Indian Tribes." *Id.* at 552. Second, the federal government made treaties with the tribes under article II, section 2, clause 2. *See id.* This Court explained that the United States' special relationship with Indians was derived from the Nation's seizure of their lands and the resulting devastation to their civilizations, which then led the United States to "assume[ ] the duty" of providing certain protections and obligations to the Indian tribes. *Id.* at 552. This history recited by the *Mancari* Court applies with similar force to the history that befell Native Hawaiians and which Congress today seeks to

redress as part of its own particular unique obligations to Native Hawaiians.[11]

B. This Court's Precedent Demonstrates That *Morton v. Mancari* Applies To Legislation Involving Indians Who Are Not Members Of A Federally Recognized Tribe

Amici contend that the *Mancari* decision is inapplicable to programs that benefit Native Hawaiians who are not part of a recognized tribe because the BIA preference at issue in *Mancari* was limited to members of a federally recognized Indian tribe, *Mancari*, 417 U.S. at 553 n.24. *See* Br. of Pacific Legal Foundation 26-27, 30-33; Br. of Mountain States Legal Foundation 10-12. This is not so. This Court's longstanding precedent demonstrates that Indians maintain their special relationship with the United States even when they are not members of a federally recognized Indian tribe.

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[11] Federal authority to deal with Indian tribes can be properly delegated to the States by Congress, *see Yakima Indian Nation*, 439 U.S. at 470-471, as is the case for some matters with respect to Hawaii.

1. Members of tribes whose government-to-government relationship with the United States has been terminated continue to hold special rights based upon their status as Indians

In *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968), this Court upheld a decision by the Court of Claims that the Menominee Tribe possessed hunting and fishing rights under the 1854 Wolf River Treaty, and that those treaty rights were not abrogated by the Menominee Indian Termination Act of 1954. Treaty rights are one of the clearest manifestations of the special relationship between the United States and Indian tribes. Yet, notwithstanding the congressional termination of the government-to-government relationship between the Menominee Tribe and the United States, the Menominee Tribe continued to possess its treaty rights. *See ibid.*; *see also Kimball v. Callahan*, 493 F.2d 564, 567-569 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (relying on *Menominee* to uphold the hunting and fishing rights of the Klamath Tribe, whose government-to-government relationship had also been terminated).

Likewise, in the Alabama-Coushatta Termination Act, 25 U.S.C. §§ 721-728 (1994), Congress provided for termination of the trust relationship between the tribe and the United States, but further provided: "That after [August 23, 1954] such Indians shall be eligible for admission, on the same terms that apply

to other Indians, to hospitals and schools maintained by the United States." 25 U.S.C. § 722. Numerous other federal statutes that confer benefits on Native Americans also provide that terminated tribes fall within these statutes' scope. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c); Native American Languages Act, 25 U.S.C. § 2902(1)-(2).

2. This Court has upheld the application of federal Indian law to Indians who do not belong to any federally-recognized Indian tribe

Contrary to *amici*'s claims, on numerous occasions this Court has sustained congressional decisionmaking as to whether federal laws should apply only to federally recognized Indian tribes or some more broadly defined group of indigenous peoples.

This Court in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. at 75, held that it was within Congress' discretion and it was not for the courts in an equal protection challenge, to determine whether certain benefits should apply only to federally recognized Indian tribes or a broader group of indigenous peoples. In *Weeks*, a group of Indians who were not members of any tribe brought an equal protection challenge to a congressional distribution scheme excluding them from sharing in an award from the Indian Claims Commission. Applying *Mancari*, this Court held that Congress' "legislative

judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Id.* at 85 (*quoting Mancari*, 417 U.S. at 555). The Court explained that Congress' decision to exclude the nonmembers—in part due to problems Congress anticipated might occur with a wider distribution based upon its prior experiences—satisfied that rationality requirement. *Id.* at 86-88. The Court, however, indicated that the equal protection component of the Due Process Clause of the Fifth Amendment also would "not preclude Congress from revising the distribution scheme to include the" excluded Indians who were not part of a federally recognized tribe. *Id.* at 90.[12]

Similarly, in *United States v. John*, 437 U.S. 634 (1978), this Court overturned a state law conviction and held that the State of Mississippi had no jurisdiction on certain tribal lands to prosecute the alleged criminal activity. Mississippi had asserted that the state law conviction should stand because, in the State's view, the Mississippi Choctaws were not subject to the Indian Reorganization Act of 1934 so that their lands were not Indian country. *Id.* at 649. The Court rejected this argument. Notwithstanding Mississippi's contention that the federal government

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[12] Significantly, the distribution scheme did include some Indians who were only "closely affiliated with," *id.* at 86, or "clearly identified with," *id.* at 89 n.22, a tribe but not members of the tribe.

had abandoned through neglect its claim to expressly legislate toward the Indians that no longer were part of an Indian tribe, the Court explained that the Indian Reorganization Act defined "Indians" to include "all other persons of one-half or more Indian blood" even if not members of a recognized tribe. *Id.* at 650. "Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." *Id.* at 653 (citation omitted).

Menominee, *Weeks*, and *John* reject the proposition that Congress' power under the Indian Commerce Clause depends on the existence of a federally-recognized tribe. Congress in fact legislates today generally as to indigenous peoples without regard to tribal status. *See, e.g.*, National Housing Act, 12 U.S.C. §§ 1701, 1715z-13a(1)-(3); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c); Indian Land Consolidation Act, 25 U.S.C. § 2201(2); Indian Civil Rights Act, 25 U.S.C. § 1301(4).

C. Even If This Court Were To Somehow Conclude That The Apology Resolution Benefits Native Hawaiians, That Statute Must Be Sustained Under *Morton v. Mancari*

As the above precedent demonstrates, if the Apology Resolution were somehow construed to give

some benefit in the ceded lands to Native Hawaiians (although it clearly does not, *see supra,* at 8-9) and the injunction here did something more than merely preserve the *status quo*, it is properly subject to the *Mancari* standard of review. The resolution would survive any equal protection challenge so long as it is "tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples. The goal of assisting indigenous peoples to reconstitute their sovereign governments has been an unassailable legitimate government purpose recognized by Congress for decades. *See, e.g.*, IRA, 25 U.S.C. §§ 461-479. Indeed, this Court's past recognition of Congress' authority to permit remnants of tribes to establish their own sovereignty is clear precedent for federal authority to deal with Native Hawaiians who likewise seek to reestablish their sovereignty. *John,* 437 U.S. at 650 n.20.

In the instant case, there can be no dispute that the Apology Resolution satisfies the deferential *Mancari* analysis. As both Congress and the court below recognized, monetary reparations for the loss of ceded lands would be insufficient because "'[t]he health and well-being of the [n]ative [H]awaiian people is intrinsically tied to *their deep feelings and attachment to the land.*'" Pet. App. 89a (quoting Pub. L. No. 103-150, 107 Stat. 1510) (emphasis added). Accordingly, the obligation to protect the ceded lands for Native Hawaiians is necessary due to "the cultural importance of the land to Native Hawaiians," *id.* at 88a, and would be tied rationally to Native

Hawaiian interests in maintaining their unique culture and reconstituting their sovereignty. *Mancari*, 417 U.S. at 555.

Indeed, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), demonstrates the solid ground upon which the state court decision resides. As this Court recognized in that case, a Pueblo could enjoin the United States from disposing of its lands as public lands of the United States. The Court held that Congress' obligation to prescribe for the Pueblo's benefit and protection precluded the disposal of the lands because it "would not be an exercise of guardianship, but an act of confiscation." *Id.* at 113. Should the Apology Resolution be construed to confer a benefit in the ceded lands to Native Hawaiians, the decision would legitimately rest upon Congress' unique relationship with Native Hawaiians and its determined obligation toward that people.

For this reason, reliance by certain *amici* on *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), is misplaced. Br. of Mountain States Legal Foundation 22. Nothing in *Adarand* demonstrates that a general rule that strict scrutiny applies to race-based classifications obviates any of Congress' centuries-old obligations to Indians, as *amici* contend. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). And the Apology Resolution—even if it could be construed to confer a benefit on Native Hawaiians—is not a generalized race-based preference; rather, the provision was

designed to ensure that the cultural identity and sovereign rights of Native Hawaiians are preserved.

CONCLUSION

This Court should dismiss the writ of *certiorari* for lack of jurisdiction and not reach the equal protection issue inappropriately raised by *amici*, but if the Court were to address that issue, the Court should find that Congress' authority under the Indian Commerce Clause applies to Native Hawaiians and should affirm the judgment of the Supreme Court of Hawaii.

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JANUARY 29, 2009

AMICUS CURIAE BRIEF

B630
Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 07-1372

IN THE

Supreme Court of the United States

STATE OF HAWAII, *ET AL.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *ET AL.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Hawaii

BRIEF AMICI CURIAE OF THE NATIVE HAWAIIAN LEGAL CORPORATION, ASSOCIATION OF HAWAIIAN CIVIC CLUBS, HAWAI'I MAOLI, NATIVE HAWAIIAN CHAMBER OF COMMERCE, 'ILIO'ULAOKALANI COALITION, COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, AND I MUA GROUP IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 07-1372

STATE OF HAWAII, *ET AL.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Hawaii

BRIEF AMICI CURIAE OF THE NATIVE HAWAIIAN LEGAL CORPORATION, ASSOCIATION OF HAWAIIAN CIVIC CLUBS, HAWAI'I MAOLI, NATIVE HAWAIIAN CHAMBER OF COMMERCE, 'ILIO'ULAOKALANI COALITION, COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, AND I MUA GROUP IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE [1]

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[1] Pursuant to Rule 37.3(a), counsel for *amici* states that the parties have consented to the filing of all *amicus* briefs. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* Native

Amici curiae include the following native Hawaiian organizations:

The Native Hawaiian Legal Corporation ("NHLC") is a non-profit, public interest law firm incorporated in 1974 to assert, protect, and defend Hawaiian land, water, and traditional rights. It is the only law firm in the state of Hawai'i that focuses on native Hawaiian rights; it provides legal assistance to families and communities engaged in perpetuating the culture and traditions of Hawai'i's indigenous people. NHLC's mission is to strengthen and enhance the lives of native Hawaiians and native Hawaiian communities through the protection and recovery of ancestral and trust lands, and the preservation of customs and practices vital to the perpetuation of Hawai'i's indigenous people.

The Association of Hawaiian Civic Clubs is the oldest Hawaiian community-based grassroots organization. It traces its beginnings to 1918, when the then non-voting Delegate to the United States House of Representatives, Prince Jonah Kūhiō Kalaniana'ole founded the first club. Today, the Association is a confederation of 56 Hawaiian Civic Clubs located throughout the continental United States, Alaska, and Hawai'i. The Association advocates at city, state, and federal levels for native Hawaiians' interests in areas, such as culture, health, economic development, education, housing, social welfare, and nationhood.

Hawaiian Legal Corporation receives a portion of its annual funding from Respondent Office of Hawaiian Affairs.

Hawai'i Maoli is a non-profit entity of the Association of Hawaiian Civic Clubs that was founded in 1997 to facilitate cultural and educational grants and contracts providing services and support to its parent organization and the native Hawaiian community. Through its capacity as the official repository for the Kau Inoa Native Hawaiian Registration Program, Hawai'i Maoli receives and maintains all completed Kau Inoa Native Hawaiian Registration forms and supporting documents.

The Native Hawaiian Chamber of Commerce was founded in 1974 to encourage and promote the interests of native Hawaiians. Its mission is to strengthen native Hawaiian businesses and professions through building on a foundation of Hawaiian values.

The 'Ilio'ulaokalani Coalition consists of native Hawaiian practitioners who are experts in traditional dance, artists, craftsmen, fishermen, and farmers. 'Ilio'ulaokalani is committed to preserving and protecting Hawaiians' traditional way of life and ancestral rights.

The Council for Native Hawaiian Advancement is a non-profit organization whose membership consists of agencies and organizations that provide direct services to Hawaiians. It arranges for technical training and assistance in the areas of health and human services, housing, community-based economic development, and business development.

The I Mua Group is an organization of native Hawaiian men and women, primarily graduates of the Kamehameha Schools, who are leaders in their communities and professions. It works to promote

and foster programs and causes that will benefit and advance the well being of native Hawaiians.

These Native Hawaiian *Amici* Organizations have participated as *amicus curiae* in other cases before this Court and the Ninth Circuit involving issues relevant to native Hawaiians.[2] *See, e.g., Rice* v. *Cayetano*, 528 U.S. 495 (2000); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997); *Arakaki* v. *Lingle*, 423 F.3d 954 (9th Cir. 2005), *vacated*, 547 U.S. 1189 (2006); *Richardson* v. *City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997).

The issue before the Court is whether the Supreme Court of Hawai'i acted within its authority when it enjoined the State of Hawai'i—under state trust law—from selling or otherwise transferring to third parties any lands currently in the State's public lands trust, based on the existence of unresolved claims to that land and an ongoing reconciliation process, as documented in, *inter alia*, Congress's 1993 Apology Resolution and similar State legislation. The injunction is to remain in place until a political reconciliation process can resolve any claims of unrelinquished title to these ancestral lands transferred at Statehood—including the subsidiary issues of who holds such claims and what the resolution encompasses.

Certain *amici* in support of petitioner, however—disregarding the limited issue that petitioner State

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[2] This brief uses the term "native Hawaiian" in the same manner as Petitioners, Respondents, the Hawai'i Supreme Court, and the Apology Resolution—to mean "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." *Infra* 15.

of Hawai'i requested the Court review—have attempted to inject issues of who should hold rights as a native Hawaiian during the reconciliation process and what those rights should be, despite the fact such questions were not litigated below and have never been a part of this dispute between the parties to this case. The Native Hawaiian *Amici* Organizations submit this brief to respond to the misplaced arguments of petitioners' outlier *amici*. The equal protection issues that those groups seek to insert into the case at this juncture were neither raised nor ruled on below and cannot and should not be considered on the record in this case. The argument of those *amici* are also wrong on the merits. The issue in this case is not who is entitled to assert unrelinquished claims during the political reconciliation process, or how the unrelinquished-claims settlement process should proceed. Those questions were not asked or answered below—and on the record in this case, are neither ripe nor germane to the issue before the Court.

INTRODUCTION

When Congress admitted Hawai'i to the Union as the 50th state in 1959, one of the conditions it imposed on the new State was that Hawai'i hold certain lands granted to it by the United States in a public land trust. *See* Admission Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4. Those lands included certain crown, government, and public lands that had belonged to the Kingdom of Hawai'i before its overthrow in 1893. The Supreme Court of Hawai'i has enjoined the State from alienating the remaining land in the public land trust, until the political reconciliation process has run its course and

settled on an appropriate resolution to unrelinquished claims to those lands—claims that date back to the overthrow of the Kingdom of Hawai'i.

In 1993, Congress marked the 100th anniversary of the overthrow of the Kingdom of Hawai'i by enacting a joint resolution—known as the Apology Resolution—seeking to educate the American public "on events surrounding the overthrow" of the Kingdom of Hawai'i and to "provide for reconciliation between the United States and the native Hawaiian people." 139 Cong. Rec. S. 14,477, 103rd Cong. 1st Sess. (Oct. 27, 1993) (Sen. Akaka). The Apology Resolution detailed the role of the United States in the "illegal overthrow of the Hawaiian monarchy" and role of the "self-declared Republic of Hawaii" in ceding sovereignty of the Hawaiian Islands—and over 1,800,000 acres of crown, government, and public lands of the Kingdom of Hawai'i—to the United States "without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution"). These 1,800,000 acres are referred to as the "ceded lands." As the Apology Resolution acknowledged, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." *Id.*

Hawai'i too enacted similar legislation. One state statute, Act 354—titled "A Bill for an Act Relating to Hawaiian Sovereignty"—"acknowledge[d] that the actions by the United States were illegal and immoral, and pledg[ed the State's] continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." 1993 Haw. Sess. L. Act 354, § 1. Similarly, another state statute, Act 359—also titled "A Bill for an Act Relating to Hawaiian Sovereignty"—was enacted to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing" and recognized that "the indigenous people of Hawaii were denied * * * their lands." 1993 Haw. Sess. L. Act 359, §§ 1-2; *see also* 1993 Haw. H.R. Con. Res. No. 179; 1993 Haw. Sess. L. Act 340, § 2; Pet. App. 35a-40a (discussing relevant State legislation).

After enactment of this federal and state legislation, the Office of Hawaiian Affairs ("OHA") and individual plaintiffs sought to enjoin the State under state trust law from disposing of lands held in the public land trust until the ongoing political reconciliation process could resolve any questions of native Hawaiian claims to the ceded lands. As OHA and the individual plaintiffs pointed out, both the federal and state legislation unambiguously acknowledged that native Hawaiians' claims to their ancestral territory remained unresolved and that reconciliation efforts should be a priority. The trial court, after conducting a bench trial, concluded that the State had express authority to alienate the ceded lands and refused to enjoin the sale or transfer of lands from the trust. Pet. App. 3a.

The Supreme Court of Hawai'i reversed and held that an injunction was warranted under state trust law. The issue, as presented to that court, was whether the State of Hawai'i has a fiduciary duty, as trustee of the public lands trust, to preserve the corpus of the trust until the unrelinquished claims of the native Hawaiians have been resolved through the political process. Pet. App. 58a. The Supreme Court of Hawai'i held that the State has such a fiduciary duty under State constitutional and statutory trust law, citing the Apology Resolution and related State legislation for support. Pet. App. 41a. The plaintiffs, as the court emphasized, "repeatedly made clear" that they were "not asking this court to return the ceded lands to the possession of the plaintiffs," but were only seeking an injunction barring alienation of the trust corpus until any unrelinquished claims are "resolved via the reconciliation process contemplated by the Apology Resolution and related state legislation." Pet. App. 69a; *see also* Pet. App. 73a (the plaintiffs "are not seeking a determination whether the native Hawaiian people are entitled to ownership of the ceded lands"). In granting the injunction, the Supreme Court went out of its way to note that "the issue of native Hawaiian title to the ceded lands will be addressed through the political process." Pet. App. 87a-88a. The court therefore would "not speculate" as to how that issue might ultimately be resolved. Pet. App. 88a.

The State of Hawai'i petitioned for a writ of certiorari. It asked the Court to review whether the Apology Resolution could be a basis for "strip[ping] Hawaii of its sovereign authority to sell, exchange, or transfer" land held in the public land trust until the

State "reaches a political settlement with Native Hawaiians about the status of that land." Pet. i. The State contended that the Supreme Court of Hawai'i erred in "construing this federal apology to impair Hawaii's sovereign prerogatives" to sell or transfer land from the State's trust. Pet. 3; *see also id.* at 11. The Court granted certiorari on this statutory interpretation issue.

ARGUMENT

I. THE SOLE QUESTION PRESENTED FOR REVIEW IS WHETHER THE SUPREME COURT OF HAWAI'I CORRECTLY INTERPRETED THE APOLOGY RESOLUTION IN ITS RULING.

A. The Court Does Not Decide Questions Neither Raised Nor Decided Below.

A few of the State's *amici* have engaged in a misguided effort to inject certain constitutional questions into the case, in hopes that they can bring into contention a complex, unripe, and unbriefed issue: whether an entire cadre of federal and state legislation that use the term "native Hawaiian" are constitutional.[3] Because neither the trial court nor

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[3] For instance, *amicus* Pacific Legal Foundation ("PLF") asks the Court to hold unconstitutional an array of statutes enacted over the last eighty-eight years—ranging from the Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), to the Hawai'i Admission Act of 1959, to the provision of the Hawai'i constitution creating OHA (Haw. Const., Art. XII, § 5) added by constitutional amendment in 1978, to the 1993 Apology Resolution. PLF *Amicus* Br. at 12-13. Similarly, *amicus* Grassroot Institute of Hawai'i ("GIH") seeks a ruling from the Court that the Hawai'i Const., Art. VII, §§ 4, 5, and 6, Haw. Rev. Stat. § 10-13.3, and "all other State laws purporting

the Supreme Court of Hawai'i were asked to resolve this question, it should not be decided by this Court either.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969) (citing cases dating back to *Owings* v. *Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809)). From those early days, the Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision' " under review. *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997)); *see also Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) (refusing to address issues not presented to state supreme court because "[w]e cannot decide issues raised for the first time here").

This rule is related to the Court's more general " 'not pressed or passed upon' rule" and is supported by the same "sound justifications." *Illinois* v. *Gates*

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to give Hawaiians or native Hawaiians any right title or interest in the Ceded Lands Trust not given equally to other beneficiaries are unconstitutional and void." GIH *Amicus* Br. 35. And *amicus* Mountain States Legal Foundation ("MSLF") requests the Court declare that "Congress is legally and factually incorrect" as to the United States government's relationship with native Hawaiians, because (in its view) "the United States has no legally cognizable relationship with persons of Hawaiian ancestry at all"—thereby rendering unconstitutional every federal legislative act benefiting native Hawaiians. MSLF *Amicus* Br. 6-7.

462 U.S. 213, 222 (1983).[4] One such justification is the scope of the record: where an issue was not pressed below, the Supreme Court declines to take the first crack at making fully informed factual findings. *See id.* at 221 (emphasizing that " 'questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind' ") (quoting *Cardinale*, 394 U.S. at 439). Another is the "important interest" in comity. *Adams*, 520 U.S. at 90. When the review sought is from a state court, " 'due regard for the appropriate relationship of this Court to state courts' " requires that constitutionality of state law and state actions be first considered in the courts of that state. *Gates*, 462 U.S. at 221-222 (quoting *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1983)).

Both considerations—record and comity—apply with force here. There is no question that the Hawai'i courts were never presented with nor asked to rule on any constitutional or equal protection issues related to native Hawaiian rights. Nor was a record developed that would support a ruling on this issue. Therefore, as in *Rice*, 528 U.S. at 521-522, the Supreme Court should assume without addressing the validity of statutory benefits for native

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[4] This Court has made clear over and over that it is not a forum to raise new issues not litigated in the lower courts and that it "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *see also Fitzgerald* v. *Barnstable Sch. Committee*, -- S. Ct. --, 2009 WL 128173, at *10 (Jan. 21, 2009) (same); *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (same); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 194 (2007) (same). This well-established rule should bar consideration of *amici*'s constitutional arguments.

Hawaiians and address only the question that is before the Court.

Undeterred by either the undeveloped record or the fact that Petitioners do not raise this issue, *amicus* PLF asks the Court to engage in a strict scrutiny analysis and conclude not only that all legislation concerning native Hawaiians is unconstitutional, but also that any claim to ceded lands by a "native Hawaiian" or "Hawaiian" is "invalid." PLF *Amicus* Br. 8. No record was developed that would support any sort of constitutional analysis—let alone a finding of unconstitutionality—as to any of these enactments or potential land claims.[5] Equally off base is *amicus* GIH's proposal that the Court address the constitutional issues to remedy the fact that Hawai'i—the Petitioner—"did not raise the constitutional" arguments in the Hawaii state courts. GIH *Amicus* Br. 2. And finally, MSLF is calling for a holding that the Apology Resolution is unconstitutional on the theory that had Congress been asked to provide support for a compelling interest, it would not have been able to do so. MSLF *Amicus* Br. 39-40. Such a wholly unprecedented and utterly irrational rule of judicial review—that the

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[5] The lack of record is especially obvious when PLF accuses OHA of failing to provide "sufficient evidence of a compelling interest" and failing to show that OHA cannot devise a narrowly tailored, individualized procedure. *Id.* at 16. The lack of evidence is for a simple reason: OHA was not asked to address, or compile a record to establish, either a compelling interest or narrow tailoring; the issue was not being litigated before the Hawai'i courts in this case. And a particularized inquiry and record would be necessary as the various statutes include both broader and narrower definitions of native Hawaiians. *Compare* Hawaiian Homes Commission Act § 201(7) *and* Admissions Act § 5(f) *with* Apology Resolution § 2.

Court can simply declare the rights of parties without waiting for the facts to be developed—is not how this Court's review works; nor is it how a constitutional analysis proceeds at any level of judicial review, state or federal. Questions not raised or decided below should not be addressed now.

B. The Court Considers Only Questions That Are "Fairly Included" In The Question Presented In The Petition.

There is another reason not to indulge the exhortations of these *amici* to expand the issues in the case at this stage. The sole question presented is a straightforward one of statutory interpretation: whether the Hawai'i Supreme Court erred in interpreting facts recited in the Apology Resolution as support for enjoining the State from selling ceded lands until the political reconciliation process has run its course. Pet. i. This case is not about what the ultimate settlement might involve, who might be parties to it, or whether native Hawaiians should be granted self-governance and self-definition rights akin to the federally recognized Indian tribes. Those questions, and the framework within which their answers will be rendered, are not presented here.

Yet *amici* PLF, GIH, and MSLF take the unusual—and improper—stance of requesting that the Court ignore the fact the State did not raise below and did not seek review of any of those questions. In fact, despite the State's explicit repudiation of these *amici*'s contentions (Hawai'i Br. 27 n.16), *amici* MSLF, PLF, and GIH assert that this Court should opine on their issues anyway. *See* GIH *Amicus* Br. 5; MSLF *Amicus* Br. 2-3; PLF *Amicus* Br. 17. This Court's rules suggest otherwise.

Rule 14.1(a) specifies that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. Rule 14.1. The Court has made clear what this rule means: Unless a question is "fairly included" in the question presented, Rule 14.1 prevents the Court from reaching it. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 352 n.13 (2005) (citing Rule 14.1 and *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 n.5 (1998)). Under this rule, even a question that is " 'complementary' or 'related' to the question presented in the petition for certiorari is not ' "fairly included therein." ' " *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 537 (1992)).

As the Court has previously explained, it has good reasons for maintaining this limitation: it would thwart "the integrity of the process of certiorari" to permit parties—or in this case, *amici*—to alter at the merits stage the issues on which certiorari was granted. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *accord Irvine* v. *California*, 347 U.S. 128, 129-130 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari.").

The Court should hew to its standard practice of not permitting new questions to be inserted after the writ of certiorari has been granted. The *amici* supporting petitioner who are attempting to "smuggl[e]" into the case new (and undeveloped) constitutional questions are asking this Court to deviate from its rules. *Id.* But such "analytically and factually" distinct questions have no place at this

stage of the case and should not be addressed by the Court under Rule 14.1. *See Izumi Seimitsu*, 510 U.S. at 32.

If there were any question about the scope of the question presented, moreover, Petitioners and the Solicitor General rebuff these *amici*'s assertion that the case constitutes a referendum on how federal and Hawaiian law deal with native Hawaiian issues. Petitioners' opening brief confirms that the question of *which* Hawaiian citizens may hold unrelinquished claims is not before the Court. Hawai'i Br. 7 n.4; *id.* 27 n.16 (disclaiming any attempt by an amicus brief to challenge constitutionality of governmental programs directed at native Hawaiians and confirming this issue is not before the Court). For that reason, Petitioners use the term "native Hawaiian" as Congress used it in the Apology Resolution: to mean "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Hawai'i Br. 7 n.4; Apology Resolution § 2. The Supreme Court of Hawai'i did the same thing. Pet. App. 6a. As all parties recognized below and here, the state-law distinction between the terms "Hawaiian" and "native Hawaiian" is not essential or relevant to the issues presented in this case. Hawai'i Br. 27 n.16; OHA Br. 3 n.1, 7 n.2.

The brief of the Solicitor General further confirms that the question presented is one of statutory interpretation, wholly unrelated to issues requiring analysis of any " 'ancestral inquiry.' " U.S. Br. 22 n.3. The Government explains that the case does not involve any challenge "to the constitutionality

of special statutory provisions for the benefit of native Hawaiians (especially provisions approved by Congress); the only question is whether the state-court injunction is contrary to the governing Acts of Congress[.]" *Id.*[6]

Rule 14.1 limits review to the question presented, or fairly considered therein. Petitioners have confirmed that their question presented does not speak to, or fairly include, constitutional equal protection issues. Their *amici*'s efforts to introduce such questions at this late stage of the game—and on an undeveloped record—should be rejected.

C. No Consideration Is Due To Claims Raised Solely By *Amicus Curiae*.

There is yet a third reason to disregard the equal protection discourse offered by some of petitioner's *amici*. The Court has repeatedly expressed its reluctance to consider arguments raised only in

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[6] In emphasizing that the Court should assume the "substantive validity" of various federal and state statutes discussing the term "native Hawaiian," the Solicitor General also notes that federal law has at times inconsistently defined the term; the definition in the Admissions Act, for example, is narrower than the definition in the Apology Resolution, which is the one the Supreme Court of Hawai'i used in interpreting that Resolution. U.S. Br. 22 n.3. *Compare* Hawaiian Homes Commission Act § 201(7) (native Hawaiian includes "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778) *with* the Apology Resolution § 2 (native Hawaiian includes "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i"). This inconsistency, not challenged or addressed below, is yet another reason the validity of statutory provisions for the benefit of native Hawaiians is not before the Court.

amicus briefs. *See Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001) (declining to address argument for reversal raised solely by *amici* that "was not raised or decided below, or presented in the petition for certiorari"); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (leaving "for another day" issue raised only by government as *amici* seeking reversal); *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 61 n.2 (1981) (declining to consider argument for reversal raised only by *amici* "since it was not raised by either of the parties here or below"); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (holding that Court had "no occasion to reach" issue that was not "urged by either party in this Court"); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (holding that Court has "no reason to pass upon" issue raised by *amicus* but not by petitioner). The State of Hawai'i did not raise—and indeed expressly disclaimed—the complex constitutional questions *amici* seek to introduce here. This is further confirmation that the Court should decline to address those questions.

II. *AMICI* SEEKING REVERSAL ON CONSTITUTIONAL GROUNDS ARE ALSO WRONG ON THE MERITS.

The view of the State's *amici* is also incorrect on the law and the facts, and the Native Hawaiian *Amici* Organizations cannot permit that view to go unanswered.

Benefits provided to native Hawaiians under federal or state law, including unrelinquished land claims, are benefits based on political status—not race—and are rooted in the governance of the once-sovereign political community in the Kingdom of

Hawai'i. Such benefits may be constitutionally accorded to native Hawaiians. *Amici* are legally and factually incorrect to contend otherwise.

A. Congressional Legislation Benefiting Descendants Of The Native Populations Of The United States Is Constitutional.

For over two hundred years, the United States has recognized certain legal rights and protections for America's indigenous peoples. Indeed, the Constitution allocates to Congress "plenary power over Indian affairs." *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998). This includes the power to recognize and define tribal status, as well as "restore[ ] previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated." *United States* v. *Lara*, 541 U.S. 193, 203 (2004); *see also Cohen's Handbook of Federal Indian Law* §§ 3.02[2], [8][c] at 137, 168 (2005 ed.) (discussing variation in how federal government has defined, recognized, and restored the tribal status of various native populations).[7] Congress has undertaken an enhanced duty of care for all of America's indigenous peoples based on their prior sovereignty and their status as the original inhabitants of the lands the United States acquired. *See, e.g.*, Report of the Committee on Indian Affairs, S. Rep. No. 110-260 at 7 (Feb. 5, 2008); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913).

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[7] Congress relied on its plenary authority, for example, in enacting the Alaska Native Claims Settlement Act, Pub. L. 92-203 (1971), as amended, 43 U.S.C. §§ 1601, *et seq.*

This Court has repeatedly recognized that the benefits Congress accords Native Americans, under its enhanced duty of care, do not reflect an impermissible racial preference. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), for example, when reviewing a hiring preference for Native Americans at the Bureau of Indian Affairs, this Court held that the preference was not a "racial preference"; "the preference [was] political rather than racial in nature" and was based on tribe members' "unique legal status" under federal law. 417 U.S. at 554-555 & n.24.

A few years later, in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977), this Court clarified that "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." It went on to explain that "[q]uite the contrary" is true: "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *Id.* (internal footnote omitted). Classifications for Indian tribes are based on the "governance of once-sovereign political communities" and are "not to be viewed as legislation of a 'racial group consisting of Indians.' " *Id.* at 646. Thus Congressional authority to legislate on behalf of Native Americans is related in large part to the prior sovereign status of the Native American tribes.

B. Congressional Legislation Benefiting Native Hawaiians Is Likewise Constitutional.

i. Prior to Western intervention, native Hawaiians were a sovereign people.

When Captain James Cook arrived on the shores of Hawai'i in 1778, he found a Hawaiian people whose cultural and political structures had developed over more than 1,000 years. *Rice*, 528 U.S. at 500. Hawaiian society had "its own identity, its own cohesive forces, its own history." *Id.* The islands were soon united as the Kingdom of Hawai'i under the leadership of Kamehameha I in 1810. *Id.* at 501. In the years that followed, the United States and the Kingdom established a government-to-government relationship. Though other nations had interests in Hawai'i, *id.* at 504, by the latter part of the nineteenth century, Americans had gained control over three-fourths of Hawai'i's commerce and most of its available land, as well as dominating political discourse. *See* U.S. Br., *Rice* v. *Cayetano*, 1999 WL 569475 at *2 (hereinafter "U.S. *Rice* Br.").

The social and economic changes in Hawai'i had a devastating effect on native Hawaiians. *Id.* In 1893, Queen Lili'uokalani sought to introduce a new constitution that would reestablish native Hawaiian control over governmental affairs. Fearing a loss of power, a group representing American commercial interests overthrew the monarchy. They were aided by the United States Minister to Hawai'i, who ordered armed U.S. naval forces to invade Hawai'i. *Id.* at *2-*3.

The American interests established a provisional government, which the United States Minister

immediately recognized as a United States protectorate. *Id.*; *see also* Apology Resolution, 107 Stat. at 1511. In 1894, the provisional government declared itself the Republic of Hawai'i. *Id.* at 1512. In 1898, Congress enacted a joint resolution annexing Hawai'i, signed by President McKinley, and the Republic of Hawai'i ceded sovereignty over the Hawaiian Islands to the United States. *Id.*

The Apology Resolution was enacted to recognize and apologize for the role that agents and citizens of the United States played in the "illegal" overthrow, which "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and "the deprivation of the rights of Native Hawaiians to self-determination." *Id.* at 1513.

ii. Native Hawaiians have the same rights and privileges accorded to other Native American communities.

The United States has long recognized that native Hawaiians are entitled to many of the same rights and considerations as other indigenous American peoples. *See, e.g.*, S. Rep. 110-260 at 7, 15; U.S. *Rice* Br. at *9 ("Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility.").[8] Indeed, Congress enacted the

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[8] While native Hawaiians do not currently have a recognized governmental body, several significant steps have recently been taken in that direction. For example, after the Apology Resolution, the Department of the Interior and the Department of Justice issued a report recommending "[a]s a matter of justice and equity" that "Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes." Dep't of the

first law benefiting native Hawaiians, the Hawaiian Homes Commission Act, shortly after the creation of the new Territory. Since then, Congress has enacted over 150 statutes addressing the conditions of native Hawaiians and providing them with benefits. S. Rep. 110-260 at 7, 19; *see also* U.S. *Rice* Br. at *4 ("Since Hawaii's admission into the Union, Congress has continued to accept responsibility for the welfare of Native Hawaiians" and "has established special Native Hawaiian programs in the areas of health care, education, employment, and loans.").

The entire premise of *amici*'s argument seems to be that native Hawaiians are not currently a federally recognized "Indian tribe." *See, e.g.*, PLF *Amicus* Br. 23-28; MSLF *Amicus* Br. 32-33. That distinction is misplaced. The "historical and unique legal relationship [between the United States and native Hawaiians] has been consistently recognized and affirmed by the Congress through the enactment of Federal laws which extend to the Hawaiian people *the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities*." 42 U.S.C. § 11701(19) (citing the Native American Programs Act of 1974, 42 U.S.C. §§ 2991, *et seq.*; the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the National Museum of the American Indian Act, 20 U.S.C.

Interior & Dep't of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* at 17 (Oct. 23, 2000). And multiple bills have been introduced in the House and Senate to provide that framework, most recently in 2007; the 2007 bill passed in the House and was referred to the Senate; the Senate voted the bill out of Committee, but it did not reach a full vote before the end of the Session. Native Hawaiian Gov't Reorg. Act of 2007, S. 310, 110th Cong. (2007); H.R. 505, 110 Cong. (2007).

§§ 80q, *et seq.*; and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, *et seq.*) (emphasis added). Thus, while native Hawaiians may not currently exercise self-governance in the formal manner of federally-recognized Indian tribes, Congress has repeatedly enacted statutes confirming the similarity of their status and has recognized native Hawaiians as a " 'distinct and unique indigenous people.' " U.S. *Rice* Br. at *4-*5 (citing statutes).[9]

As the United States explained in *Rice*, "the existence of a [recognized] tribal government * * * is not a necessary predicate for the exercise by Congress itself of its unique power to fulfill the Nation's obligation toward indigenous people." *Id.* at *18.[10] Congress is therefore free to exercise its plenary authority on behalf of native Hawaiians just

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[9] *See, e.g.*, 20 U.S.C. § 7512(1) ("Native Hawaiians are a distinct and unique indigenous people[.]"); 42 U.S.C. § 11701(1) (same); 20 U.S.C § 7512(12)(A) ("Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands[.]"); 42 U.S.C. § 11701(13) (the Hawaiian Homes Commission Act "affirm[ed] the trust relationship between the United States and the Native Hawaiians" as confirmed by the Committee Report explaining that " 'natives of the islands [ ] are our wards' "), *id.* § 11701(20) ("The United States has also recognized and reaffirmed the trust relationship to the Hawaiian people through legislation which authorizes the provision of services to Native Hawaiians[.]").

[10] The Court in *Rice* assumed without deciding that Congress could treat Hawaiians or native Hawaiians as a tribe, 528 U.S. at 519, but went on to hold that even if they were a tribe, tribal status could not be a basis for limiting voting for a State's public officials under the Fifteenth Amendment. *Id.* at 520.

as it would any other Native American group, and *amici* have no legal basis to suggest otherwise. Indeed, the United States has explained that for native Hawaiians, any requirement "that there be a recognized tribal government would be particularly unjustified" because the United States' trust obligation to native Hawaiians arose from its "responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands." *Id.* Congress directs many services and benefits to native Hawaiians; it does not do so "because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has established a trust relationship." *Id.* at *10; *accord* 20 U.S.C. § 7512(12)(B) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship"); Hawaiian Homelands Homeownership Act of 2000, Pub. L. 106-569, § 512, 114 Stat. 2944, 2966-69 (2000) (Congressional findings in support of 25 U.S.C. § 4221) (same).

The United States continues to recognize its special relationship with, and heightened sense of duty to, the indigenous people of Hawai'i—a duty it reaffirmed in the Apology Resolution. *Amici*'s attempt to re-write the history and the present for native Hawaiians is a deeply misguided effort. The United States' position is clear and unambiguous: "Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its

sovereignty or its sovereign lands." U.S. *Rice* Br. at *9. The history of our Nation's trust relationship with the native Hawaiian people renders "native Hawaiian" a permissible political classification similar to those recognized by this court in *Mancari* and *Antelope*. Contrary to *amici*'s because-we-say-so assertions—"native Hawaiian" is something far different, and far richer, than a mere racial classification.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Hawai'i should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 2 8 2009
OFFICE OF THE CLERK

No. 07-1372

In the Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS
v.
OFFICE OF HAWAIIAN AFFAIRS, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR NATIVE HAWAIIANS, SAMUEL L. KEALOHA, JR., VIRGIL EMMITT DAY, JR., PATRICK KAHAWAIOLAA, JOSIAH L. HOOHULI, AND MEL HOOMANAWANUI, AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the resolution adopted by Congress to acknowledge the United States' role in the 1893 overthrow of the Kingdom of Hawaii strips the State of Hawaii of its present-day authority to sell, exchange, or transfer 1.2 million acres of land held in a federally created land trust unless and until the State reaches a political settlement with native Hawaiians about the status of that land.

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I. INTEREST OF AMICI

Amici,[1] SAMUEL L. KEALOHA, JR., VIRGIL EMMITT DAY, JR., PATRICK KAHAWAIOLAA, JOSIAH L. HOOHULI, AND MEL HOOMANAWANUI, are all native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, Pub.L. 67-34, 42 Stat. 108 (1921) ("HHCA"). Amici support Respondent OHA's contention that the injunction granted by the Hawaii Supreme Court is properly grounded in state law and not prohibited by federal law. Amici are all Plaintiffs in *Day v. Apoliona,* Docket No. 08-16704 (9th Cir. 2008), now pending before the Ninth Circuit Court of Appeals, seeking to prevent OHA from spending the income and proceeds from trust established by § 5(f) of the Hawaii Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959) on non-beneficiaries, and to instead use such monies to fund implementation of the HHCA. Additionally, three of the Amici were intervenor-applicants in *Barrett v. Cayetano*, 314 F.3d 1091 (9th Cir. 2002), and *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003), seeking to protect native Hawaiian interests from diminishment by OHA and abolishment by Plaintiffs therein. Also,

[1] No person other than amici and their counsel has participated in any way in the writing of this brief or contributed to fund its preparation and submission.

four of the Amici were Plaintiffs in *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), seeking equal protection of the law as a preventive measure from attack by persons wanting to abolish the HHCA and §5(f) trust.

Samuel L. Kealoha, Jr., 60, is a U.S. Army Vietnam-Era veteran who served in Vietnam, 1st Cav. 2-5. He is a Hawaiian homestead applicant, who has been on the waiting list since 1977. The reason the State has failed to deliver his homestead is the State "lost" his application. Mr. Kealoha's interest is his concern that the parties here, both the State and its OHA, are not speaking on behalf of native Hawaiian beneficiaries. "They are talking over us. The scheme of undermining the native Hawaiians' interest in § 5(f) and it being subject to corruption has gone on too long. The State came up with this charade of OHA, and the U.S. has not brought suit against the State for breach of trust under § 5(f). The United States should know the difference between Congress' definition of native Hawaiian of 1920, (that the state solemnly accepted in 1959,) versus the State's made-up definition of 'Hawaiian' in 1978, when it manufactured the OHA scheme created to undermine growing native Hawaiian interests in § 5(f)." Mr. Kealoha is also a former OHA trustee, and can provide this Court a unique vantage from a native Hawaiian who, as

Trustee, was too often out-voted by "Hawaiian" trustees (hostile to native Hawaiians), who sought to benefit themselves and this diluted class of "Hawaiians," including their friends, relatives and others who are not native Hawaiian, with lucrative contracts. Mr. Kealoha witnessed the State's OHA agency misspend § 5(f) proceeds that could have been used to fund the HHCA.

Virgil Emmitt Day, Jr., 65, is a U.S. Army Vietnam-Era veteran, who applied for a Hawaiian homestead in 1984, yet did not receive his lease until 1999, because the State claimed they had no money for infrastructure. Now a lessee, yet holding an unimproved lot with no paved road and no running water, at Kahiki Nui, island of Maui. Mr. Day is a member of Ka Ohana o Kahiki Nui, a homestead beneficiary organization seeking settlement of Kahiki Nui. Ka Ohana o Kahiki Nui applied to OHA for a grant for water tanks, but OHA refused to expend any § 5(f) money to assist the beneficiaries.

Patrick Kahawaiolaa, 63, is a U.S. Navy Vietnam-Era veteran who, as a native Hawaiian, was born and raised on the Keaukaha Hawaiian homestead, serving in various capacities, the latest as President of the Keaukaha Hawaiian Homestead Association for approximately the last six (6) years. Keaukaha, on the Big Island of Hawaii, opened in

1924, the second Hawaiian homestead, following Kalamaula, on the island of Molokai. Mr. Kahawaiolaa has been a party in a number of suits against the State of Hawaii, its Department of Hawaiian Home Lands (DHHL) and OHA. His main interest is full implementation of the HHCA, rehabilitation and self-determination of native Hawaiians, use of § 5(f) monies to benefit native Hawaiians and to settle the homelands. Mr. Kahawaiolaa also has been a party in opposing HHCA § 221 violations, dealing with burdensome water costs sought to be charged to homesteaders by the state's counties, in clear violation of the HHCA. Mr. Kahawaiolaa lost his homestead over this fight. Mr. Kahawaiolaa also opposed removal of Hawaiian home lands from the inventory of lands available to native Hawaiian settlement, as the State of Hawaii continues, to this day, to lease such lands to persons, parties and entities not contemplated by the HHCA. The State does so under pretext it has no money, while funneling millions to OHA that, in turn, does not expend such §5(f) monies on beneficiaries of the HHCA to settle their lands.

Josiah L. Hoohuli, 70, is a U.S.M.C. Veteran. A pure blood native Hawaiian, and homestead lessee, he was raised on his mother's homestead, who received her lease in 1930. Born in 1938, Mr. Hoohuli has lived his entire life on the Hawaiian

homestead, except for two years in California while in the service, but served two years in the USMC in Hawaii, when he resided upon his homestead. Mr. Hoohuli, opposed the State of Hawaii creating OHA in 1978, giving OHA § 5(f) monies, while OHA does not help fund the HHCA. Mr. Hoohuli believes native Hawaiian beneficiaries should be in charge of their own money so that it can be used for native Hawaiian economic independence, self-sufficiency and rehabilitation upon the homelands. Mr. Hoohuli is a founding member of Ho'ala Kanawai, Inc, that was formed in about 1975, and is significant because it was an educational agency charged to educate native Hawaiians about § 5(f) of the Admission Act, and also be the entity for native Hawaiians.

Mel Hoomanawanui, 68, is retired from the Honolulu Fire Department, and a homesteader of Lai o Pua Hawaiian homestead, Kona, island of Hawaii. Mr. Hoomanawanui joined Ho'ala Kanawai, Inc., in 1978. Mr. Hoomanawanui has always been an advocate for bona-fide native Hawaiians. He vehemently opposes the State funneling § 5(f) monies to its agency, OHA, and OHA misusing, misspending and cheating native Hawaiians out of monies that should be used to fund the HHCA, or otherwise rehabilitate native Hawaiians.

All five of these Amici hold to the position that, since Congress used identical language in both the HHCA, and § 5(f), the rule of statutory construction of *in pari materia* applies. Both Acts of Congress are to be read together through a lens to glean Congressional intent that unmistakably calls for § 5(f) proceeds designated for native Hawaiians be used for the "rehabilitation" of native Hawaiians.

"Rehabilitation" is the very purpose of the HHCA. *See In Re Aiona*, 60 Haw. 487, 591 P.2d 607 (1979); *Ahuna v. Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P.2d 1161 (1982). The term "rehabilitation" means "self-determination," similar to that applied to various American Indian nations, tribes, bands, clans, rancherias, domestic dependant communities and Alaskan native villages under the Indian Reorganization Act of 1934, 25 U.S.C., § 461 et seq.

The fundamental difference that separates these native Hawaiian Amici from the position taken by the State's OHA, is that the Amici hold the United States is not the cause of mass dispossession of commoner native Hawaiian tenants in 1893. Instead, it was the Kingdom of Hawaii in the Mahele of 1848, forty-five years *before* the overthrow, which was responsible for causing untold suffering and destitution among the common

native Hawaiian tenants.

OHA's argument, restated previously in the Apology Resolution, and now in the proposed Akaka bill pending in Congress, is that the overthrow of the Kingdom in 1893, is the root of all evil befallen native Hawaiians. But that is an incomplete account of the actions by the Kingdom and the Mahele of 1848. OHA perhaps unwittingly conceals and obscures that it was the Kingdom that dispossessed the native Hawaiian commoner tenants; driving them off their ancestral lands and into the urban core to live in slum, shanty-town, tenement housing conditions. Left abandoned, in squalor, destitute and in abject poverty by the Kingdom, it was in such dismal condition that Congress found this discrete group of native Hawaiians in 1920, when Congress enacted the HHCA.

Amici strongly oppose any effort by those that seek to reestablish the miserable failure that was the Hawaiian Monarchy. A review of this "Monarchy," reveals that it was not a native Hawaiian concept. Instead, it was imported from Europe, lasted a brief 83 years, and was the instrument that led to common native Hawaiian tenants being dispossessed. That, and the greed of the participating chiefs and konohiki in the Mahele, is the real cause of the suffering endured by

common native Hawaiian tenant heirs today. Amici also point out that many of the Great War Chiefs who backed Kamehameha I during the wars of conquest, refused to participate in the Mahele, for they saw what it would do to the people. They were also dispossessed and stripped of their lands along with the chiefs defeated in the Kamehameha wars, as well as disinherited chiefs all were left without lands, and became homeless wanderers in their homeland, just as destitute as the commoners, sharing in this sad destiny and condition Congress sought to remedy under the HHCA and § 5(f).

These conditions linger to this very day, and it was the intent of Congress to treat such conditions under the HHCA and § 5(f), since 1921.

This you will not hear from the State or its agency, OHA. This you hear from the native Hawaiian Amici respectfully submitting this brief for your consideration.

II. SUMMARY OF ARGUMENT

There is nothing in federal law that would preclude the Hawaii Supreme Court from enjoining Petitioners from transferring ceded lands until the unresolved claims of native Hawaiians have been resolved through the reconciliation process contemplated by the Apology Resolution or the

comparable resolution adopted by the state legislature; PROVIDED, HOWEVER, that the reconciliation process is conducted with a native Hawaiian entity composed of native Hawaiian beneficiaries of the HHCA and Admission Act.

The classification of native Hawaiians as beneficiaries of the HHCA and § 5(f) trust is not a racial classification at all. Instead, it is a criterion which Congress has the sole power to use to reach the people with the closest degree of kinship to those who were unjustly and wrongly deprived of their one-third undivided interest in the 1.4 million acres of land conveyed by the United States to the state of Hawaii in the Admission Act.

But, if the definition of native Hawaiian in the HHCA is found to be a racial classification, it is a discrete group. The provisions are narrowly defined, as the United States points out in their amicus brief, and the HHCA itself is narrowly tailored, to vindicate a compelling governmental interest: treatment of heirs of native Hawaiian tenants dispossessed of their ancestral lands by the Kingdom of Hawaii in the Mahele of 1848. The United States, coming into title, possession and control of such undelivered lands, acted to treat such native Hawaiians under the HHCA and § 5(f).

III. ARGUMENT

A. Issues raised by Petitioner and amici are not within the scope of the question presented.

The main issue of interest to Amici is the continued validity of the HHCA and the § 5(f) trust. Nevertheless, Amici support and join Respondents' arguments 1) that there were adequate grounds under state and federal law to support an injunction granted by the Hawaii Supreme Court; 2) that many of the issues raised by Petitioners, the United States and other amici are not within the scope of the question presented and are, therefore, not properly before the court; and, 3) that even if those issues are properly before the court they are without merit. However, as native Hawaiian beneficiaries of the § 5(f) trust, Amici herein have a different perspective than Respondents which they hope this court will consider.

B. There were adequate grounds under state and federal law to support an injunction granted by the Hawaii Supreme Court

1. Native Hawaiians may not be native Hawaiians.

The HHCA set aside approximately 200,000 acres of land in Hawaii designated as "available

lands" for 99-year leasehold homesteads for "native Hawaiians." HHCA, § 201(a)(7) defines "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Section 5(f) of the Admission Act requires that all land conveyed to the state of Hawaii by the United States in § 5(b) *and § 5(e)*, be held in trust by the state, in part, "for the betterment of the conditions of native Hawaiians, *as defined in the Hawaiian Homes Commission Act, 1920, as amended.*" [emphasis added]. Section 4 of the Admission Act requires that the HHCA be made a part of the constitution of the state "[a]s a compact with the United States relating to the management and disposition of the Hawaiian home lands."

Section 213(i) of the HHCA, as amended, provides:

> Native Hawaiian rehabilitation fund. Pursuant to Article XII, Section 1, of the State Constitution, thirty per cent of the state receipts, derived from lands previously cultivated as sugarcane lands under any other provision of law and from water licenses, shall

> be deposited into this fund. The department[2] shall use this money solely for the rehabilitation of *native Hawaiians* which shall include, but not be limited to, the educational, economic, political, social, and cultural processes by which the general welfare and conditions of habilitation fund. Pursuant to Article XII, Section 1, of the *native Hawaiians* are thereby improved and perpetuated.

[emphasis added] .

Article XII, Section 1 of the Constitution of the State of Hawaii adopted in 1978 accepts this compact created by § 4 of the Admission Act and provides further that thirty percent of the income from former sugarcane lands and water licenses be paid to DHHL to be used for the rehabilitation of *native Hawaiians*. A similar provision was

[2] "Department" refers to the Department of Hawaiian Home Lands, not the Office of Hawaiian Affairs. HHCA, § 202. OHA and DHHL are separate and distinct agencies, although OHA did recently make a loan to DHHL in the amount of $3 million. This was the first time in 30 years that OHA used any of the $456 million of § 5(f) trust funds it has administered for the purpose of helping to implement the HHCA. Had the entire $456 million been used for that purpose, many beneficiaries on the DHHL waiting lists could have received their homestead awards. Amici would like to think that this loan was made in response to their efforts in bringing the issue before the courts in *Day v. Apoliona, supra.*

contained in the original unamended version of the HHCA. HHCA, § 213. So, although the language of § 213 has been amended over the years, the sugarcane lands referred to therein are any state lands that have been leased for sugar cane since 1921.

Article XII, Section 4 of the Constitution of the state of Hawaii purports to create a trust upon the land conveyed to the state by § 5(b) of the Admission Act, excluding the Hawaiian home lands, for the benefit of "native Hawaiians and the general public." While the home lands are covered in Article XII, Section 1, there is no provision in the state constitution for the disposition of income and proceeds from the § 5(c) lands.

Article XII, Section 5 creates the Office of Hawaiian Affairs, and Article XII, Section 6 gives OHA power:

> to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for *native Hawaiians*.

[emphasis added].

The state constitution does not define "pro rata portion" or "Hawaiians." A proposed Article XII, Section 7, defining the terms "native Hawaiian" and "Hawaiian" was not ratified by the voters and did not become part of the 1978 state constitution. *Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543 (1979). Therefore, the only definition of "native Hawaiian" in the state constitution is the one found in HHCA, §201(7).

Nevertheless, the state legislature defined the terms "Hawaiian" and "Native Hawaiian" in H.R.S. §10-2, as follows:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.
>
> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778

and which peoples thereafter continued to reside in Hawaii.

Thus, there are three separate statutory definitions of the descendants of the original inhabitants of the Hawaiian Islands: the state definition of "Hawaiian"; the state definition of "Native Hawaiian" ; and the HHCA definition of "native Hawaiian." Amici believe these distinctions are crucial to the resolution of this case. In this brief, the term, "native Hawaiian" always refers to the HHCA definition of "not less than one-half part" blood quantum and the term "Hawaiian" always refers to descendants of the original inhabitants without regard to blood quantum, i.e. those with one drop of Hawaiian blood, or one ancestor in five hundred or one-sixty fourth part blood quantum. Of course, the term Hawaiians also includes the subset of native Hawaiians.

Adding to the confusion, parties, courts and legislative bodies often fail to recognize these distinctions. For example, the Apology Resolution, which is at the heart of this litigation, uses the term "Native Hawaiian" without defining the term, but probably meaning Hawaiians.

The Akaka Bill, S. 310, 110th Cong. (2007), cited by Respondents, defines and uses the term "Native Hawaiian" without regard to blood quantum. *Id.*,

§3(10). Therefore, the term "Native Hawaiians" in the Akaka Bill really means "Hawaiians." In so defining "Native Hawaiian", the Akaka Bill makes several false statements in its supporting findings. The bill falsely states:

> pursuant to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside approximately 203,500 acres of land to address the conditions of Native Hawaiians in the Federal territory that later became the State of Hawaii;

Id., § 2(5)

> by setting aside 203,500 acres of land for Native Hawaiian homesteads and farms, the Hawaiian Homes Commission Act assists the members of the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii;

Id., § 2(6)

> in 1959, as part of the compact with the United States admitting Hawaii into the Union, Congress established a public trust (commonly known as the 'ceded lands trust'), for 5 purposes, 1 of which is the betterment of the conditions of Native Hawaiians;

Id., § 8A

> the United States has recognized and reaffirmed the special political and legal relationship with the Native Hawaiian people through the enactment of the Act entitled, 'An Act to provide for the admission of the State of Hawaii into the Union', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4), by
>
> (A) ceding to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held as a public trust for 5 purposes, 1 of which is for the betterment of the conditions of Native Hawaiians;

Id., § 21

These statements are true only with respect to native Hawaiians. Congress did not set aside land in the HHCA or create a the § 5(f) trust for the betterment of the conditions of Hawaiians who are not also native Hawaiians.

The Hawaii Supreme Court in its opinion below magnifies this confusion even further. Throughout its opinion, the Hawaii Supreme Court uses the term native Hawaiian with a lower case 'n' without definition. *Office of Hawaiian Affairs v. HCDCH*, 117 Haw. 174, 177 P.3d 884 (2008). The Court goes so far as to replace the upper case 'N' as used in the Apology Resolution with a lower case 'n.' In the

statement of Historical Background, the court begins by reciting that, on admission to the union, the state acquired title to lands from the United States, in trust, in part, for the betterment of the conditions of native Hawaiians, as defined by the HHCA. *Id.* 117 Haw. at 181. The court goes on to discuss how the 1978 constitutional amendments clarified the state's obligation to native Hawaiian beneficiaries of the 5(f) trust. *Id.*, 182. Use of the term "native Hawaiian" with a lower case 'n' is consistent with the HHCA definition.

Ultimately, the court below ordered that the defendants be enjoined "from selling or otherwise transferring . . . any ceded lands from the public lands trust until the claims of the *native Hawaiians* to the ceded lands has been resolved." *Office of Hawaiian Affairs v. HCDCH, supra,* 117 Haw. at 181 [emphasis added]. It is not clear what the court means by "native Hawaiians", but the lower case 'n' suggests blood quantum as in HHCA.

It is also not clear what was meant by "ceded lands", or "public lands trust." In 1898, the Republic of Hawaii "ceded" 1.8 million acres of land to the United States. In 1959, the United States "ceded" 1.4 million acres of land to the state of Hawaii. The 1.4 million acres "ceded" to Hawaii in 1959 includes the 200,000 acres set aside as available lands for

native Hawaiians in the HHCA. In 1978, the Hawaii State Constitution, Article XII, Section 4, purported to create a "public trust" comprising 1.2 million acres of ceded lands, not including the available lands for the benefit of native Hawaiians and the general public.

The parties seem to agree that they are talking about 1.2 million acres of land, but it is unclear exactly when or how the "public lands trust" they are talking about was created. If the trust, was created in 1898, then the corpus is 1.8 million acres and the uses and purposes are not clear. If the trust was created in 1959, then the corpus is 1.4 million acres and the uses and purposes are as set forth in § 5(f). If the trust was created in 1978, then the corpus is 1.2 million acres and the beneficiaries are native Hawaiians and the general public and the uses and purposes are unstated.

The only trust of which Amici are aware is the trust created by Congress in 1959 by § 5(f) of the Admission Act, which includes the HHCA. This is the only trust discussed in the opinion below as it is quoted at the outset. It is clear that native Hawaiians do in fact have an interest in the ceded lands conveyed to the state in 1959 under the provisions of the HHCA, Admission Act and state constitution quoted above. It is not clear that

Hawaiians, other than native Hawaiians, have an interest in those lands.

2. Native Hawaiians, as defined in the HHCA, do have unresolved claims to the ceded lands

The § 5(f) trust clearly established a beneficial interest in favor of native Hawaiian beneficiaries that is enforceable in the courts. *Day v. Apoliona,* 496 F.3d 1027, 1039 (9th Cir. 2007). This trust includes the HHCA and the federal-state compact obligating the state to fulfill the commitment to native Hawaiians in HHCA. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission,* 739 F.2d 1467 (9th Cir. 1984). This trust has a corpus of 1.4 million acres of ceded lands conveyed to the state pursuant to both sections § 5(b) and § 5(e) of the Admission Act.

The state of Hawaii has been less than faithful in performing its fiduciary duty to native Hawaiians under the HHCA and § 5(f) trust. *Final Report on the Public Land Trust,* Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians,* Hawaii Advisory Committee to the U.S. Commission on Civil Rights,

December 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force*, Office of the Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands*, Auditor of the State of Hawaii, Rep. No. 93-22, December 1993; "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians" *Wall Street Journal*, September 9, 1991, p. 1.

Indeed, even at this very moment DHHL is in serious breach of trust with respect to approximately one-quarter of the total available lands. On the slopes of Mauna Kea, DHHL has 50,000 acres of some of the best pasture land in the state. This land had been leased out to Parker Ranch from the time of statehood until 2003, under leases that required the lessee to control noxious weeds. Parker Ranch did not control the noxious weeds and left the land infested with gorse. By some estimates, as much as 25,000 acres of this land has been rendered totally unusable by the spread of gorse and the remaining 25,000 acres is in danger of being blighted and laid waste.

DHHL has taken no action against Parker Ranch for breach of the leases. Indeed, DHHL actually obtained the dismissal of a suit by a

neighboring rancher against DHHL and Parker Ranch for failure to control the gorse. The dismissal was recently overturned by the Hawaii Intermediate Court of Appeals in *Freddy Nobriga Enterprises, Inc. v. DHHL, et al.*, 118 Haw. 209, 186 P.3d 593 (App. 2008) and the case remanded to the Third Circuit Court of the State of Hawaii.

In recent years many thousands of acres of former sugarcane lands have been sold by the state for development. Based on all the other breaches of trust by the state, Amici believe that it may have failed to comply with the provision requiring the state to pay thirty percent of the proceeds of these sales to DHHL pursuant to HHCA § 213(i) and Article XII, § 1 of the state constitution. It is doubtful that the state even has a record of which lands have been leased for sugar cane at any time since enactment of the HHCA.

Even though individual native Hawaiian beneficiaries have the right to sue state officials for breach of the § 5(f) trust in federal courts, the courts so far, have not granted the beneficiaries any affirmative relief in such cases. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985) ("Price I"); *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990); *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990) ("Akaka I");

Price v. State of Hawaii, 939 F.2d 702 (9th Cir. 1991) ("Price II"); *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993) ("Akaka II"); *Han v. U.S. Dept. Of Justice*, 45 F.3d 333 (9th Cir. 1995); and *The Hou Hawaiians v. Cayetano*, 183 F.3d 945 (9th Cir. 1999). During all of this time, the United States has taken no action to enforce the trust, as it is entitled to do under § 5(f). Indeed, the United States has even resisted efforts to compel it to take such action. *The Hou Hawaiians v. Cayetano, supra.* And, of course, the beneficiaries cannot sue the state itself in federal court by virtue of its Eleventh Amendment immunity.

Therefore, there are substantial unresolved claims for breach of trust that could be resolved by the reconciliation process contemplated in the Apology Resolution. The Hawaii Supreme Court could have ordered an injunction preventing the sale of § 5(f) ceded lands pending the political resolution of those claims by native Hawaiians.

The Admission Act does not preclude this. The admission Act provides that the income and proceeds from the ceded lands shall be used for "*one or more* of the foregoing purposes in such manner as the constitution and laws of said State may provide." The state has wide discretion in the use and management of the trust corpus and could,

consistent with the provision of § 5(f), use the entire income and proceeds of the § 5(f) trust for the "betterment of the conditions of native Hawaiians" "as the constitution and laws of the said State may provide."

Therefore, there is nothing in federal law that would preclude the Hawaii Supreme Court from enjoining Petitioners from transferring ceded lands until the unresolved claims of native Hawaiians have been resolved through the reconciliation process contemplated by the Apology Resolution or the comparable resolution adopted by the state legislature; PROVIDED, HOWEVER, that the reconciliation process is conducted with a native Hawaiian entity composed of native Hawaiian beneficiaries of the HHCA and Admission Act.

C. Remaining issues are beyond the scope of the question presented.

Since there was adequate grounds under state law for the injunction granted by the Hawaii Supreme Court which was not precluded by the Admission Act or other provision of federal law, all other issues raised by Petitioners and their supporting amici are moot. The Respondents' brief is quite adequate on this point and Amici have nothing further to add on this subject.

D. The designation of native Hawaiians as beneficiaries of HHCA and § 5(f) is not a racial classification.

The parties and the United States all agree that the validity of the HHCA and § 5(f) trust are not at issue in this case. Therefore, one might conclude that the equal protection challenges by other amici are likewise not before the court. However, the equal protection issue may be relevant to whether or not the United States and/or the state of Hawaii is able to engage in a reconciliation process with native Hawaiians at all.

Amici herein believe this is a serious question with respect to Hawaiians in light of Justice Breyer's comments in his concurring opinion in *Rice v. Cayetano*, 528 U.S. 495, 526-7 (2000). Justice Breyer, expressed his concern about an Indian analogy argument. He noted that all Indian tribes have a blood quantum requirement. He felt that the lack of a blood quantum in the state definition of "Hawaiian" was sufficient to reject the Indian analogy argument. Therefore, to the extent that the state engages in a reconciliation process with Hawaiians, it may be subject to an equal protection challenge under the reasoning in *Rice*. Indeed, the Akaka Bill may also be subject to such challenge so long as it does not contain a blood quantum. Amici

will leave this issue to other parties, however, because Amici are not concerned with the interests, if any, of Hawaiians. The definition of native Hawaiian in the HHCA includes a blood quantum and is, therefore, not subject to the issue raised by Justice Breyer.

To the extent that the equal protection does become an issue in this case, it does not apply to HHCA or §5(f) because classification of native Hawaiians as beneficiaries therein is not a racial classification at all. Instead, it is a criterion which Congress is empowered to use to reach the people with the closest degree of kinship to those who were unjustly and wrongly deprived of their one-third undivided interest in the 1.4 million acres of land conveyed by the United States to the state of Hawaii in the Admission Act.

In 1778, upon arrival of James Cook in the Sandwich Islands the native Hawaiian population exceeded 300,000. Wright, Theon, *The Disenchanted Isles*, The Dial Press, New York (1972) p. 68. It is generally accepted that there was then in existence a feudal type of land ownership system, in which all of the land was owned by the King and granted by him to his chiefs, known as *konohikis,* and, in turn, by them to lower level chieftans and eventually the tenant farmers. *See* Chinen, Jon Jitsuzo, "Original

Land Titles in Hawaii", Library of Congress No. 51-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and the Rights of Native Tenants," Security Title Corp., Honolulu, Hawaii (1974), p. 1.

Even then it could not be considered a true feudal system, as native tenants were not serfs with no interest in the land. Instead, Hawaiian native tenants, as a group, had an undivided one-third interest in the total land mass of the Hawaiian Islands and surrounding waters. This was recognized in the first constitution of the Kingdom of Hawaii adopted in 1840. As provide therein:

> Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, *though it was not his own private property. It belonged to the chiefs and the people in commo*n, of whom Kamehameha I was the head, and had the management of landed property.

State v. Zimring, 58 Haw. 106, 111 (1977) quoting Fundamental Law of Hawaii (1904) at 3 quoting The Constitution of 1840.

This shows that the King held title merely as trustee for the use and benefit of the beneficiaries the chiefs, *konohikis* and common

people.

On December 10, 1845, the Board of Commissioners to Quiet Titles, commonly known as the Land Commission was established to adjudicate and settle disputes over titles of real property. Cannelora, *supra*, p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the ownership of the land at that time was held in equal one-third undivided interests by the King, the *konohiki* landlords and the tenants living on the land. Cannelora, *supra*, pp. 10, 12. *See also Thurston v. Bishop*, 7 Haw. 421, 430 (1888). These principles are fully set out in Revised Laws of Hawaii, 1925, v. II, pp 2120-2152.

The Land Commission analyzed in detail the land system existing at the time in the Islands. It then declared that "there are but three classes of person having vested rights in the land, 1st, the government, 2nd, the landlord (the chiefs and konohiki), and 3rd, the tenant." Chinen, Jon Jitsuzo, "The Great Mahele", University of Hawaii Press, (1957), p. 9.

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem the King and *konohikis*

divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the King and 245 *konohikis* made between January 27, 1848 and March 7, 1848, which allowed the *konohiki* to take his or her claim to the Land Commission and obtain title to the land *subject to the rights of the native tenants*. Cannelora, *supra*, p. 13.

Native tenants were not able to obtain title to their interests until 1850, when legislation was enacted allowing them to present *kuleana* claims to the Land Commission. Cannelora, *supra*, 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the *konohiki* class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims, after which the claims were forever barred. *Id*. p. 19. The *konohiki,* on the other hand, were given up to 49 years to file claims. *Id*. Third, native tenants were required to incur considerable expense of a survey of their claim, while *konohiki* were not. *Id*. As a result, only approximately 28,000 acres of land far less than the one-third interest that had previously been recognized was awarded to native tenants under this provision. Fuchs, Lawrence H., *Hawaii Pono: A*

Social History, Harcourt, Brace & World, Inc., New York (1961) p. 257.

Thus, this provision purportedly to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of native tenants who failed to go through the process of surveying and registering *kuleana* claims. Title to the land to which they would have been entitled remained with the Kingdom of Hawaii. This land was eventually transferred to the United States by the Newlands Resolution and thence to the state of Hawaii by the Admission Act.

As a result, by 1920, native Hawaiians were "a landless people in the country of their forefathers." Sen Doc. No. 151, 75th Cong., 3d Sess, Serial Set 10247 (Jan. 5, 1939), pp. 81-83. At the same time, an undivided, undelivered one-third interest in the 1.8 million acres of government land was impressed with the outstanding equitable property interests of native tenants who did not receive their lands under the *kuleana* law.

Therefore, it was entirely appropriate for Congress to set aside 200,000 acres of this land in order to redress this grave injustice and rehabilitate the native Hawaiian people. Congress enacted the HHCA and sections 4 and 5 of the Admission Act as

compensation to the descendants for the loss their ancestors had suffered in the Mahele. The benefits conferred thereby upon native Hawaiians do not involve a racial classification. This can be seen simply by changing the date and/or place contained in the definition.

The definition of "native Hawaiian" in the HHCA was crafted in a way to compensate the heirs of those people who had lost their land when a Western legal system was imposed upon them. The definition does not include Tahitians or Samoans or other people of the Polynesian races because they were not inhabitants of the Hawaiian Islands and did not unjustly lose their interest in the land.

Nor is the classification of "not less than one-half part" a racial classification because it excludes descendants of less than one-half part. This is a criterion determining the degree of kinship to those who lost their interests. It is no different than ordinary laws of intestate descent and distribution that establish degrees of kinship necessary in order to inherit property of a deceased ancestor.

E. The native Hawaiians are the victims of racial discrimination not the beneficiaries of it.

Turning to the Indian analogy, Amici do not care

to waste this Court's time hiking over "difficult terrain" to arrive at the destination finding native Hawaiians are, in fact, members of a domestic dependant community. Like the Pueblos in *United States v. Sandoval*, 231 U.S. 28 (1913) native Hawaiians are not Indian.

However, Amici have maintained that they are ethnically distinct from American Indians, they are nevertheless Native Americans who are *victims* racial discrimination by being excluded from the benefits of the Indian Reorganization Act. This issue was raised and wrongly decided by the Ninth Circuit in *Kahawaiolaa v. Norton*, *supra*. The Indian Reorganization Act provides certain benefits to Indian tribes recognized by the Secretary of the Department of the Interior. Yet under DOI regulations, native groups from Hawaii are prohibited from applying for federal recognition. 25 C.F.R. § 83.1. This is the same geographical classification that this Court found was a racial classification in *Rice*.

But the Ninth Circuit found that the exclusion of native Hawaiians from the benefits of the IRA was not a racial classification and therefore applied the rational basis standard of review rather than strict scrutiny. *Kahawaiolaa v. Nortion, supra*, 386 F.3d at 1278. The Ninth Circuit concluded it was rational

to exclude native Hawaiians from the provisions of the IRA because Congress had provided special benefits to native Hawaiians in the HHCA and Admission Act. The court concluded that:

> It is rational for Congress to provide different sets of entitlements one governing native Hawaiians and another governing members of American Indian tribes. It would also be rational for Congress to decide that native Hawaiians should be prohibited from applying for federal recognition. Otherwise, as members of a newly recognized Indian tribe or tribes, native Hawaiians would be entitled to the special rights and privileges granted to native Hawaiians *and* to those accorded to American Indians.

Id., at 1282-3 [emphasis in original].

How ironic would it be to deny native Hawaiians the rights and benefits of the IRA because they are not a racial classification and because Congress has provided the HHCA and § 5(f) trust for them and then to invalidate HHCA and the § 5(f) trust because native Hawaiian is a racial classification?

As a practical matter, it would be much more reasonable for the United States and state of Hawaii to engage in a reconciliation process with native Hawaiian groups established by themselves and recognized under the same criteria as Indian

tribes rather than an artificial group including hundreds of thousands of non-beneficiaries. The state would obviously rather negotiate with non-beneficiaries than the actual beneficiaries themselves, otherwise they would have included a blood quantum in the Akaka Bill.

F. Even if the HHCA definition of "native Hawaiian" is a racial classification it survives an equal protection challenge under the strict scrutiny standard.

If the definition of "native Hawaiian" as defined in the HHCA is found to be a racial classification, Amici suggest that it is nevertheless permissible and would survive the test of strict scrutiny, because that term is a narrow and limited definition carefully crafted to reach a discrete group of beneficiaries, under a Congressional plan to treat the conditions of such discrete group from the catastrophic effects suffered by members of this group and the harmful effects following their dispossession from their ancestral lands since the time of the Mahele of 1848.

It is not simply the United States on a good will mission to benevolently bestow some sort of favor on native Hawaiians simply because they are native Hawaiian. Instead, it is a fact that the United States came into title, possession and control of

lands of the former Kingdom, and which lands were impressed with the undistributed, equitable, outstanding, property rights of the native Hawaiian tenants.

But, that is still not the compelling governmental interest. It is a fact that the native Hawaiian tenant population plummeted under the Kingdom, which condition was made even worse by the callous failure of the Kingdom to deliver to the native Hawaiian tenants their previously acknowledged and recognized one-third, undivided interest in the lands of the Kingdom.

When the number of native Hawaiians had plummeted from about 300,000, in 1778, to only 40,000, in 1920, and Congress became aware of the condition of native Hawaiians teetering on the verge of extinction, and Congress found, following extensive hearings, the cause of such dismal conditions of the commoner native Hawaiian tenants then barely surviving in abject poverty in the urban centers of Hawaii, it was in 1920, that the United States Congress was so moved to enact the HHCA to treat these native Hawaiians.

Landlessness, destitution and poverty: that is the legacy left by the Kingdom of Hawaii, to the native Hawaiian tenants.

It was the United States Congress that determined long ago in 1920, the connection between the dismal condition of the native Hawaiian tenants and their loss of their land. It was the United States Congress that went about to repair such condition by setting aside a portion of the land the United States held, for the exclusive benefit and the purpose of rehabilitating the common native Hawaiian tenants and their heirs under the HHCA.

It was the United States Congress that reasoned that rehabilitating the common native Hawaiian tenants upon a portion of their formerly undistributed lands (that should have been distributed in the Mahele of 1848,) would allow the native Hawaiians to strive to pick themselves up through hard work, on their lands, and thereby rehabilitate themselves with the opportunity under the HHCA.

The HHCA was intended to provide the native Hawaiians their lands, and § 5(f) was supposed to provide these identical beneficiaries the funding to achieve and vindicate this yet unfulfilled compelling governmental interest. It has been the state of Hawaii that has failed to fulfill this promise.

Therefore, even if "native Hawaiian" is a racial

classification, it, and the HHCA, and the provisions for native Hawaiians in 5(f), are constitutionally valid and will withstand close examination under strict scrutiny.

IV. CONCLUSION

The judgment of the Hawaii Supreme Court enjoining Petitioners "from selling or otherwise transferring . . . any ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands has been resolved" should be affirmed, provided that the term "native Hawaiians" is defined as provided in the Hawaiian Homes Commission Act, 1920.

Respectfully submitted,

Honolulu, Hawaii: January 28, 2009

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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(11)

No. 07-1372

In the

Supreme Court of the United States

HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Hawaii

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QUESTION PRESENTED

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29% of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), the Cato Institute, and the Center for Equal Opportunity submit this brief amicus curiae in support of Petitioners State of Hawaii, et al.[1]

For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Most notably, PLF participated as amicus curiae in support of petitioner Harold F. Rice in *Rice v. Cayetano*, 528 U.S. 495 (2000). Both *Rice* and the present case concern Article XII, Section 5, of the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Hawaii Constitution, which established the State of Hawaii's Office of Hawaiian Affairs (OHA). In *Rice*, this Court found that the terms "native Hawaiian" and "Hawaiian," as used by the OHA, are racial classifications, and that a race-based scheme that allowed only statutorily-defined "Hawaiians" to vote for trustees of OHA was unconstitutional.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs. It also filed a brief in *Gratz* and *Grutter*, and published a *Review* article on *Parents Involved*. The instant case is of central concern to Cato because it implicates the Institute's strong belief that all citizens should be treated equally before the law.

The Center for Equal Opportunity is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education and voting. Officials from CEO testified before the Hawaii State Advisory Committee to the United States Commission on Civil Rights regarding the Native Hawaiian Government Reorganization Act of 2007.

Despite *Rice*, and Justice John Marshall Harlan's admonition 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), OHA and the State of Hawaii continue to treat "native Hawaiians" and "Hawaiians" as different classes among Hawaiian citizens. This practice has spawned numerous lawsuits, finally culminating in the present legal crisis in which the State of Hawaii's sovereign authority to manage its land for the good of all of its citizens has been replaced with a court-imposed duty to hold the land for the benefit of one racial class. The decision of the state court below is based upon its tortured interpretation of a United States Congressional Joint Resolution, an interpretation which ignores constitutional principles of equal protection.

This Court announced in *Rice* the unwavering principle that "[t]he Constitution of the United States . . . has become the heritage of all the citizens of Hawaii." *Rice*, 528 U.S. at 524. Amici file this brief to argue that Hawaii, once and for all, is required to abandon its racial classifications and treat all of its citizens with the equality to which they are entitled under the United States Constitution.

STATEMENT OF THE CASE

The administration of the ceded lands trust and the Apology Resolution can be understood only in the context of Hawaii's pervasive race-based laws and entitlements. By a joint resolution adopted by Congress on July 7, 1898, known as the Newlands Resolution, the Hawaiian Islands were annexed as a part of the territory of the United States. *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 209 (1903). Formal

transfer was made on August 12, 1898, "when . . . the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States." *Id.* at 210. The Republic of Hawaii became the "territory of Hawaii" on June 14, 1900, when the islands were formally incorporated by act of Congress. *Id.* at 211. By this act the Constitution was formally extended to Hawaii. *Id.* "[U]nder the Newlands resolution, any new legislation must conform to the Constitution of the United States." *Id.* at 215.

Unfortunately, this restriction has been widely and systematically ignored. New legislation was enacted and implemented which did *not* conform to Constitutional principles of equal protection. Those laws directly led to a state-wide violation of the Fifteenth Amendment which necessitated this Court's intervention and resolution in *Rice*. *Rice*, 528 U.S. at 517 ("The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."). In *Rice*, this Court overturned Hawaii's race-based voting scheme but did not disturb the state's "implementation of a congressional directive to allocate trust distributions to people with little biological relationship to aboriginal Hawaiians." L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 770 n.428 (2001). All but one of those trust-distribution laws remain in place today.

The race-based congressional directive, and the laws that have been passed by Hawaii for its implementation, remain in effect and are

unquestionably the direct root of the problem at hand. The Hawaii Supreme Court declared that the individual plaintiffs in this case are "clearly beneficiaries of the ceded lands trust" only by virtue of their racial status as native Hawaiians. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 177 P.3d 884, 905 (Haw. 2008) (*OHA*). The holding below is thus premised on an incorrect interpretation of the Apology Resolution and race-based government actions that cannot be squared with the Constitution's guarantee of race-neutral government.

SUMMARY OF ARGUMENT

The core issue of this case is whether a state court, interpreting federal law, may enjoin the State of Hawaii from exercising its sovereign authority to sell, lease, or rent the "ceded lands" for the benefit of all Hawaiian citizens, pending some resolution, as yet unknowable, of the claims of native Hawaiians to those lands. As this Court recognized in *Rice*, 528 U.S. at 505, the Republic of Hawaii ceded all of its former Crown, government, and public lands to the United States upon annexation in 1898. Revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750 (1898); *Rice*, 528 U.S. at 505. This is not an academic issue: the Hawaii Supreme Court's judgment will have enormous practical impact because it fundamentally restructures the State's obligations under the Act admitting Hawaii as the 50th State by commanding the State to favor a racially defined class to the exclusion of other beneficiaries of the ceded lands trust.

The decision by the Hawaii Supreme Court represents nothing less than a rewriting of the terms by which Hawaii entered the Union. Hawaii was admitted to the Union in 1959 by an overwhelming majority of its residents.[2] At that time, the United States granted back to Hawaii title to all public lands and public property within the boundaries of the State—the ceded lands—save those which the federal government retained for its own use. Admission Act, Pub. L. No. 86-3, §§ 5(b)-(d); 73 Stat. 4 (1959); *Rice*, 528 U.S. at 507. The lands, and the proceeds and income generated by the ceded lands, were to be held "as a public trust" to be "managed and disposed of for one or more of" five purposes: (1) for the support of the public schools and other public educational institutions; (2) for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act;[3] (3) for the development of farm and home ownership on as widespread a basis as possible;

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[2] The election results from June 27, 1959, show that 94% of voting Hawaii residents favored statehood. Grassroot Institute of Hawaii, 1959 Results of Votes Cast, *available at* http://www.grassrootinstitute.org/documents/HawaiiStateHoodVote.pdf (last visited Dec. 5, 2008).

[3] The Hawaiian Homes Commission Act was created by the United States Congress to set aside over 200,000 acres of ceded lands for exclusive homesteading by native Hawaiians. Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921). As a condition of statehood, the United States required Hawaii to adopt the act as a provision of the state Constitution, *see* Haw. Const. art. XI, § 2 (1959) (renumbered art. XII, § 2 (1978)). The Hawaiian Homes Commission Act defines the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act § 201(7) of the Hawaiian Homes Commission Act.

(4) for the making of public improvements; and (5) for the provision of lands for public use. Admission Act § 5(f); *Rice*, 528 U.S. at 508.

In 1978, Hawaii amended its Constitution to establish a new State agency, Respondent Office of Hawaiian Affairs. *See* Haw. Const. art. XII, § 5. OHA's race-conscious mission is "[t]he betterment of conditions of native Hawaiians . . . . [and] Hawaiians." Haw. Rev. Stat. § 10-3 (1993). OHA is governed by a nine-member board of trustees, elected by qualified voters in the State. *See* Haw. Const. art. XII, § 5; Haw. Rev. Stat. § 13D-1 (1993). Former statutory provisions that limited eligible voters in OHA trustee elections to citizens of Hawaiian ancestry were repealed after this Court held those provisions to violate the Fifteenth Amendment. *See Rice*, 528 U.S. 495.

State law gives OHA broad authority to administer two categories of funds: a 20% share of the revenue from the ceded lands,[4] which OHA is to administer for "the betterment of conditions of native Hawaiians," Haw. Rev. Stat. § 10-3, and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const. art. XII, § 6. *See generally* Haw. Rev. Stat. §§ 10-1 to 10-16. The terms "native Hawaiians" and "Hawaiians," as used by the OHA, are racial classifications. *Rice*, 528 U.S. at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

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[4] In 1992, the Hawaii Legislature enacted Act 318 (codified as Haw. Rev. Stat. § 10-13.6 (1993)) that set forth a formula to compensate OHA for revenues from ceded lands. Haw. Rev. Stat. § 10-13.6(e) (Supp. 2007). According to Act 318's formula, OHA was to be compensated 20% of the fair market value of the subject lands. Haw. Rev. Stat. § 10-13.6(a).

In 1993, the Congress of the United States passed a Joint Resolution recounting an edited history of Hawaii, and offering an apology to the native Hawaiian people for the overthrow of the Kingdom of Hawaii. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); *Rice*, 528 U.S. at 505.

Any claim to ceded lands derived from language in the Apology Resolution or Admission Act, or any other legislation purporting to grant preferences based upon the terms "native Hawaiian" or "Hawaiian," is presumptively invalid. Those terms have already been determined in *Rice* to be racial classifications and government actions relying on those classifications must be subjected to strict judicial scrutiny. The Apology Resolution is intentionally void of any language amending or rescinding the Admission Act, because congressional intent reveals that it was not intended to change any existing laws. Reliance on the Apology Resolution to divest Hawaii of its sovereign authority—and require the State to hold the ceded lands for the benefit of one racial class in possible perpetuity—is therefore misplaced.

ARGUMENT

I

RACE-BASED GOVERNMENT IS IMPERMISSIBLE UNDER CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION

Eight years ago, in *Rice*, this Court struck down as unconstitutional a provision in the Hawaii Constitution prohibiting non-Hawaiian citizens from voting in a statewide election. At that time, the Court reviewed Hawaii's troubled history and Justice

Kennedy, writing for the majority, provided a sound approach to deal with the realities facing that State:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

Rice, 528 U.S. at 524. Justice Kennedy's starting point is just as important today as it was in *Rice*, for it is important to remember that, although Hawaii became this Nation's 50th State only relatively recently in 1959, the territory of Hawaii has been subject to the Constitution and its principles for over 100 years.

A. This Court Already Held in *Rice* That the Terms "Native Hawaiian" and "Hawaiian" Are Racial Classifications

Government action dividing people by race is inherently suspect because such classifications "promote notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 493, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus

contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

The Supreme Court of Hawaii, relying on racial classifications imposed by the federal government, the Hawaii Constitution, and implementing statutes, and ignoring the Fifth and Fourteenth Amendments, has implicitly held that native Hawaiians have a legal claim to ceded lands based upon their race. The court held in *OHA*, 177 P.3d at 905, that the State of Hawaii may not sell, exchange, or transfer 1.2 million acres of state land—the ceded lands—unless and until it reaches a political settlement with *native Hawaiians*. In other words, the State of Hawaii must manage the majority of its State-owned land for the benefit of one racial group, and not for the benefit of all citizens of Hawaii.

In *Rice*, this Court found unconstitutional a race-based scheme that allowed only statutorily defined "Hawaiians" to vote for trustees of the OHA, because the statutory definitions of "native Hawaiian" and "Hawaiian" as used by the OHA and by the United States in the Hawaiian Homes Commission Act are racial classifications. The statutory definitions analyzed in *Rice* are the same definitions used by the federal government and the State of Hawaii in regard to the ceded lands. In 1978, Hawaii amended its Constitution to establish the OHA. Haw. Const. art. XII, § 5. The mission of the OHA is "[t]he betterment of conditions of native Hawaiians . . . . [and] Hawaiians." Haw. Rev. Stat. § 10-3.

The term "Hawaiian" is defined in the statute as:

> [A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

Haw. Rev. Stat. § 10-2. The statute also defines "native Hawaiians" as follows:

> [A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Id. When it analyzed a Hawaiian-only voting requirement in *Rice*, this Court found that the statutory definitions were race-based definitions:

> In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and

> respect. The state, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

Rice, 528 U.S. at 515 (citation omitted).

The Court's analysis in *Rice* of the statutory definitions of "native Hawaiian" and "Hawaiian" as used in Hawaii's constitutional provision creating the OHA (and its implementing statutes) applies directly to this case. That is because the lower court defines "native Hawaiians," as that term applies to the OHA, as beneficiaries of the ceded land trust. *OHA*, 177 P.3d at 905. Further, OHA, "which is charged 'with managing proceeds derived from the ceded lands and designated for the benefit of native Hawaiians,' can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust." *Id.* (citation omitted). The very premise of the lower court's decision that native Hawaiians have a race-based legal right to the ceded lands is thus suspect.

B. Government Action Providing for Race-Based Claims to the Ceded Lands Fails Strict Scrutiny

The federal government, through the Hawaiian Homes Commission Act of 1920 and the Admission Act of 1959, and the State of Hawaii through its constitutional provision creating the OHA and its implementing statutes, have instituted racial classifications by introducing and defining the terms "native Hawaiian" and "Hawaiian."

The Equal Protection Clause of the Fourteenth Amendment demands strict scrutiny of a facially racial statutory classification. *See, e.g.*, *Shaw*, 509 U.S. at 642 ("Express racial classifications are immediately

suspect"); *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224; *see also Croson*, 488 U.S. at 493-94 (opinion of O'Connor, J.). Under that rigid equal protection standard, a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. The application of strict scrutiny to the Hawaiian Homes Commission Act, the Admission Act, and the laws of Hawaii leads to the conclusion that race-based claims to the ceded lands are unconstitutional.

In the decision below, the Supreme Court of Hawaii based its holding on the Apology Resolution. *OHA*, 177 P.3d at 920:

> The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved.

The Apology Resolution enumerates wrongs purportedly caused to the native people of Hawaii by agents and citizens of the United States leading to the overthrow of the Kingdom of Hawaii and its eventual

annexation.[5] Even if the Apology Resolution is based upon correct history,[6] long past societal discrimination alone cannot serve as the basis for rigid racial preferences. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) ("an effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson*, 488 U.S. at 498-99; *Wygant*, 476 U.S. at 276 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.* at 288 (O'Connor, J., concurring in part and concurring in judgment) ("a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster").

This Court has recognized that if long past societal discrimination alone can serve as the basis for rigid racial preferences, then the door would be open "to competing claims for 'remedial relief' for every disadvantaged group." *Croson*, 488 U.S. at 505. The promise provided by our Constitution that our government is a Nation where race is irrelevant to personal opportunity and achievement would be

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[5] The Apology Resolution contains a brief opening paragraph, followed by thirty-six short "whereas" paragraphs, but no findings of fact. A "whereas" clause has no operative effect, and the court below could not rely on such clauses as fact. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 n.3 (2008) ("[W]here the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do.").

[6] The findings of the Apology Resolution have been criticized as bad history. *See, e.g.*, Thurston Twigg-Smith, *Hawaiian Sovereignty: Do the Facts Matter?* (1998).

broken in a "mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.* at 506. Courts would be required to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those groups whose societal injury is deemed to have "exceed[ed] some arbitrary level of tolerability then would be entitled to preferential classifications". *Bakke*, 438 U.S. at 297. The "result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Croson*, 488 U.S. at 506. Racial classifications must be clearly identified and unquestionably legitimate because such classifications "so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic." *Id.* at 505 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting) (footnotes omitted)).

The Apology Resolution lacks evidence of specific present or past discrimination necessary to compel a race-conscious remedy. *See Croson*, 488 U.S. at 504 ("While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."). The Native Hawaiians Study Commission, created by Congress on December 22, 1980 (Pub. L. No. 96-565, § 302; 94 Stat. 3321 (1980)), expressly found that native Hawaiians were not entitled to compensation or reparations on the basis of the historical wrongs they may have suffered. 1 Native Hawaiians Study Commission, *Report on the Culture, Needs and*

Concerns of Native Hawaiians 28 (1983)[7] ("[T]he Commission concludes that, as an ethical or moral matter, Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty."). And the Apology Resolution does not state that native Hawaiians are entitled to compensation or reparations for the supposed wrongs it enumerates.

Even if the Apology Resolution is factually correct and does provide sufficient evidence of a compelling interest, there is no showing that claims to the ceded lands by every native Hawaiian, including claims to portions of revenues from the sale, lease, or rent from the ceded lands, is a narrowly tailored remedy for individual discrimination. *See Bakke*, 438 U.S. at 299 ("If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."). The OHA has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior discrimination. In other words, Respondents must show that preferential treatment afforded to native Hawaiians is not simply a product of "administrative convenience" in grouping together all native Hawaiians. *Cf. Croson*, 488 U.S. at 508. OHA cannot argue that native Hawaiians are entitled to preferences simply because they are members of a particular racial group that has suffered

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[7] *Available at* http://wiki.grassrootinstitute.org/mediawiki/media/9/97/1-497.pdf (last visited Dec. 8, 2009).

discrimination. *See Bakke*, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

Moreover, providing one racial group entitlements to the revenue of the ceded lands could potentially continue indefinitely and therefore is not "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Adarand*. 515 U.S. at 238 (citation omitted). Consequently, any "redress of wrongs" argument also fails strict scrutiny. The predicament in which the State of Hawaii and OHA find themselves can be directly traced to the racial classifications being used to this day in the Hawaiian Homes Commission Act of 1920, the Admission Act of 1959, and the State of Hawaii through its constitutional provision creating the OHA and its implementing statutes. Even if the Court finds that the laws providing Hawaii with justification for its race-based preferences are unchallenged here, the Court has an independent obligation to subject those laws to judicial scrutiny and ensure that present and future government action is narrowly tailored to achieve a compelling interest.

In *Miller v. Johnson*, 515 U.S. 900 (1995), this Court applied its "presumptive skepticism of all racial classifications" to unchallenged Justice Department rulings advanced as a defense to alleged voting rights violations. *Id.* at 922. The Court explained that "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), the issue of

whether state judicial enforcement of a racial classification would violate the Equal Protection Clause was not properly brought before the Court, but the Court applied analysis under the Fourteenth Amendment anyway. *Evans*, 382 U.S. at 303 (White, J., dissenting). In *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court based its decision on unchallenged but plainly unconstitutional state racial laws, and held that the Fourteenth Amendment "can neither be nullified openly and directly by state . . . officers, nor nullified indirectly by them through evasive schemes." *Id.* at 17. These cases demonstrate that even when the constitutionality of an underlying racial preference is not at issue, that preference may not be used to justify challenged race-based government action.

C. Determining Who Should Be Classified as a "Native Hawaiian" or "Hawaiian" Is Repugnant to Our Constitutional Ideals of Equal Protection

The differing definitions of "native Hawaiian" and "Hawaiian" illustrate another reason why racial classifications are offensive to the Constitution. Determining who is and who isn't a member of some chosen race is divisive, and has always been offensive to our country's notions of equality. *Cf. Plessy*, 163 U.S. at 552 ("Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race."); *see also Takao Ozawa v. United States*, 260 U.S. 178, 197 (1922):

> Manifestly the test afforded by the mere color of the skin of each individual is

> impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.

As Justice Stevens has emphasized, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting). Chief Justice Roberts, when faced with having to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, sadly observed, "It is a sordid business, this divvying us up by race." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring).

The case exemplifies this concern: both the federal government and the State of Hawaii have enacted numerous laws with varying definitions based on percentage of Hawaiian ancestry for the purposes of determining eligibility for preferences. State and federal laws define Hawaiians differently based upon some "blood quotient" in order to bestow preferential treatment.

Government-imposed racial classifications based upon some imaginary blood quotient at best creates a legal fiction and at worst hearkens to the one-drop rule and Nuremberg Laws. "A person whose blood quantum is as little as one-sixty-fourth that of a full-blooded Polynesian (a figure suggested by Hawaii), and who might ascribe fully to aboriginal Hawaiian culture, is not, in any meaningful sense, a biological

Polynesian." Gould, *supra*, at 739 (see *Rice*, 528 U.S. at 514). Considerable doubt exists whether race can even be quantified scientifically. Prior to the science of genetics, racial characteristics were believed to be inherited by blood. Peter Farb, *Humankind* 276 (1978). The current preoccupation with blood quanta by both the State of Hawaii and the federal government stems from this misconception. *Cf.* Gould, *supra*, at 754 (explaining the preoccupation with blood quanta in the census, and references to Indians as "full-bloods" and "mixed bloods" in the nineteenth century and persisting into the twenty-first).

Racial divisions based on genes are also proving to be unreliable. *Id.* Genetic differences among the three customary groupings, Mongoloids, Negroids, and Caucasoids, are only slightly more pronounced than they are between individuals. *See* Lawrence Wright, *One Drop of Blood*, The New Yorker, July 25, 1994, at 50 (citing research of Masatoshi Nei & Arun K. Roychoudhury, *Gene Differences Between Caucasian, Negro, and Japanese Populations* (1972)). And "[p]ure races do not exist . . . in any . . . sexually-reproducing animal, including humankind." Farb, *supra*, at 275.

There is no taxonomic basis in biology or physiology to support racial distinctions used by the U.S. Census. Barry Edmonston & Jeffrey S. Passel, *How Immigration and Intermarriage Affect the Racial and Ethnic Composition of the U.S. Population*, in *Immigration and Opportunity: Race, Ethnicity, and Employment in the United States* 383 (Frank D. Bean & Stephanie Bell-Rose eds., 1999); *see also United States v. Bhagat Singh Thind*, 261 U.S. 204, 212 (1923) (finding common agreement on what constitutes a

racial division to be practically impossible).[8] Nonetheless, for years the Census Bureau used categories that divided people among five "racial" categories: American Indians and Alaskan Natives, Asian and Pacific Islanders, Blacks, Whites, and Hispanics. Office of Management and Budget, Executive Office of the President, *Statistical Directive* 15 (1977). American Indians, Alaskan Natives, and Asians and Pacific Islanders are not racially distinct from one another. In the 2000 census, "Native Hawaiian" was made a separate category for the first time. Revisions to the Standards for Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

Who should be considered a Hawaiian? Because there is no single Hawaiian tribe or nation that can make this determination, the state and federal governments have answered this question with arbitrary distinctions. The State of Hawaii's Office of Hawaiian Affairs defines "Native Hawaiian" (with a capital "N") as a person of Hawaiian ancestry, regardless of blood quantum; and a "native Hawaiian" (with a lower case "n") refers to those with 50% or more *Hawaiian blood*. State of Hawaii Office of Hawaiian Affairs, *Native Hawaiian Data Book—1998, Definitions of Race* 600-01 (1998) (*Native Hawaiian Data Book*);

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[8] The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has 5 races; Keane following Linnaeus, 4; Deniker, 29. The explanation probably is that 'the innumerable varieties of mankind run into one another by insensible degrees, and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

Bhagat Singh Thind, 261 U.S. at 212 (footnotes omitted).

but see Bhagat Singh Thind, 261 U.S. at 211 (classifying Polynesians, including native Hawaiians, as Caucasian).[9]

The Department of Hawaiian Home Lands follows the 1921 Hawaiian Homes Commission Act to define "native Hawaiian" as any descendant of not less than one-half of the blood of the races inhabiting the Hawaiian Islands previous to 1778. *Native Hawaiian Data Book* (citing Hawaiian Homes Commission Act). But a homestead lease successor (spouse or child) may be only one-quarter "Hawaiian." Hawaiian Homes Commission Act § 209. Members of the Hawaiian Homes Commission "shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. Hawaiian Homes Commission Act § 202.

There is no rhyme or reason to any of these classifications; the artificial approach used by state and federal authorities only perpetuates and increases racial division. It has also spawned seemingly endless litigation, with the courts forced to undertake the

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[9] The word 'Caucasian' is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin, which under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example (*The World's Peoples*, 24, 28, 307, *et seq.*), it includes not only the Hindu, but some of the Polynesians (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.

Bhagat Singh Thind, 261 U.S. at 211 (footnotes omitted).

distinctly suspect task of verifying racial bona fides and who properly qualifies as a "Hawaiian,"[10] and whether such classifications are proper. *See, e.g., Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (plaintiffs who claimed at least 50% bloodline asserted exclusive control over state programs to benefit "Hawaiians," currently open to anyone with one drop of Hawaiian blood); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (limiting candidates for OHA trusteeship to those of Hawaiian ancestry unconstitutional); *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (non-Hawaiian student challenged school's policy of giving preference to students of native Hawaiian ancestry). It is anathema for courts interpreting the Equal Protection Clause to be weighing racial taxonomies and categorizations made thereunder.

II

THE INDIAN COMMERCE CLAUSE DOES NOT PROVIDE A BASIS FOR LAWS THAT GRANT PREFERENCES TO NATIVE HAWAIIANS

The Constitution grants Congress "plenary and exclusive" powers to legislate in respect to Indian tribes. *E.g., Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *see also*

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[10] Most native Hawaiians are of mixed ancestry and it is estimated that fewer than 6,000 *full-blooded* Hawaiians remain. An OHA study from 1984 found that one in three Native Hawaiians had between 50 and 100% blood quantum, while only 1 in 25 native Hawaiians had 100% blood quantum. *Native Hawaiian Data Book* at 30. More than 60% of native Hawaiians had less than 50% blood quantum. *Id.*

William C. Canby, *American Indian Law* 2 (3d ed. 1998) ("the independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes").

The Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3,[11] and the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, have been traditionally cited as the sources of that power. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The federal government's power to deal with Indian tribes is based upon a "special relationship":

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, s 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

Mancari, 417 U.S. at 551-52. Indian tribes thus enjoy a "unique legal status" under federal law and upon the plenary power of Congress. *Id.* at 551.

The Treaty Clause confirms that any special relationship is limited to quasi-sovereign Indian

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[11] Congress shall have power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". U.S. Const. art. I, § 8, cl. 3.

Tribes. As Chief Justice Marshall stated for the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), the Constitution "has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties." *Id.* at 559. Individual native Hawaiians are incapable of entering into treaties with the United States; otherwise the federal government could make treaties with any group of two or more descendants of an indigenous race, regardless of whether that group retains any sovereignty or internal governmental structure, and such "Treaties" would be the "supreme Law of the Land." U.S. Const. art. VI.

In *Mancari*, this Court considered whether an employment preference to Native Americans under the Indian Reorganization Act of 1934 was in fact an unconstitutional racial preference violative of the Fifth Amendment.[12] *Mancari*, 417 U.S. at 537. This Court held that equal protection issues were not implicated, because the "preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities"—that is, "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 554 n.24. To be eligible for the preference under the Indian Reorganization Act, the Indian had to meet a certain blood quantum and be a member of a "Federally-recognized tribe." *Id.* The purpose of laws enacted to give Indians certain

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[12] In light of this Court's decision in *Adarand*, 515 U.S. at 227, which held that all racial classifications imposed by federal, state, and local governmental actors must be reviewed under strict scrutiny, it may be the case that *Mancari*, 417 U.S. 535, has been overruled, or that *Mancari* is limited to Congress's "special relationship" with Indian tribes. But the Court need not address the tension between *Adarand* and *Mancari* here.

preferences has been "to give Indians a greater participation in their own self-government, to further the Government's trust obligation toward the Indian tribes, and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42 (footnotes omitted). None of these purposes apply in reference to laws granting preferences to native Hawaiians.

When legislation is enacted that classifies Indians according to race, the legislation must still be subject to strict scrutiny. For instance, in *Adarand*, the presumptively disadvantaged groups were " 'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities.'" *Adarand*, 515 U.S. at 205 (quoting Small Business Act, 15 U.S.C. § 637(d)(2)-(3) (1994)) (emphasis added). In *Croson*, the relevant definition was U.S. citizens who are " 'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts.'" *Croson*, 488 U.S. at 478 (citation omitted) (emphasis added). In these cases, this Court never indicated that the benefits for Native American Indians would be subject to rational basis review. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 568 (1996).

Furthermore, as stated above, in *Rice*, this Court held that the statutory definitions of "native Hawaiian" and "Hawaiian" as used by the OHA and by the United States in the Hawaiian Homes Commission Act are racial classifications. *Rice*, 528 U.S. at 515. It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Parents Involved*, 127 S. Ct.

at 2751-52 (citing *Johnson*, 543 U.S. at 505-06; *Grutter*, 539 U.S. at 326; and *Adarand*, 515 U.S. at 224).

Only under very specific circumstances may Congress, through its special trust responsibility to Indian Tribes, provide preferences to Indians that are reviewed under rational basis. In *Mancari*, that preference did not apply to all Indians, but only those who were members of a federally recognized tribe. *Mancari*, 417 U.S. at 554 n.24. The legislative language in the OHA, the Hawaii Homes Commission Act, and even the Apology Resolution does not refer to any native Hawaiian tribe, however, but rather to individual native Hawaiians based upon a classification that this Court has held to be racial.

OHA's position would still lack merit if the legislative language did refer to Hawaiian tribes, because there is no single native Hawaiian group that unifies or represents all native Hawaiians. *See* Benjamin, *supra*, at 577-78 n.172 (discussing the multitude of groups that claim to represent native Hawaiians, and the division within the native Hawaiian community over whether there should be a native Hawaiian government). And even if there were a single native Hawaiian tribe or numerous native Hawaiian tribes, the state and federal statutes granting benefits to native Hawaiians must still be subject to strict scrutiny, because those benefits apply to *all* native Hawaiians, not just those with a tribal affiliation. *Id.* at 581.

In short, federal Indian law is a unique compromise with preconstitutional realities—one

based on *political* rather than *racial* classifications—that is inapplicable to Hawaii.

III

THE APOLOGY RESOLUTION NEITHER AMENDS NOR RESCINDS FEDERAL LAW

In 1993, both houses of Congress passed the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii. This Apology Resolution textually precludes OHA's claims here. First, there is no express language in the Apology Resolution which recognizes, identifies, or creates a legal right by native Hawaiians, or any other group defined by race or ancestry, to any of the ceded lands. To the contrary, the Apology Resolution expressly provides that it may not serve as a settlement of any claims against the United States. Apology Resolution § 3.

The Apology Resolution should not be construed in a manner that calls into question its constitutionality, as the lower court has done. This Court has long adhered to the policy stated in *Hooper v. California*, 155 U.S. 648, 657 (1895): "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach also recognizes "that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing

Grenada County Supervisors v. Brown, 112 U.S. 261, 269 (1884)). Indeed, this Court held in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504-07 (1979), that a statute will not be construed in such a way as to call for the resolution of difficult and sensitive constitutional questions. The Apology Resolution does not run into constitutionality problems because it was a wholly symbolic act.

The Apology Resolution provides absolutely no command or direction to any federal or Hawaiian state agency as to any general or specific implementing action. No paragraph in the Apology Resolution states any express instruction in regard to the ceded lands. Nor is there any paragraph that excuses any federal or state agency from enforcing existing laws or regulations, and therefore no implementing action can be implied. The executive branch has never issued any presidential or regulatory guidance on how federal or state agencies should address the resolution or pursue follow-on actions.

Nevertheless, the Hawaii Supreme Court interpreted the Apology Resolution to mean that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands." *OHA*, 177 P.3d at 901. But that contention overlooks the remarks to the Senate by the senior senator from Hawaii, Senator Daniel Inouye, who spoke to allay fears that the resolution had any implications regarding claims to the ceded lands:

> As I tried to convince my colleagues, this is a simple resolution of apology, to recognize the facts as they were 100 years ago. As to the matter of the status of Native Hawaiians, as my colleague from Washington knows, from

> the time of statehood we have been in this debate. Are Native Hawaiians Native Americans? This resolution has nothing to do with that. **This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that.**
>
> **It is a simple apology.**

103 Cong. Rec. S14482 (daily ed. Oct. 27, 1993, statement of Senator Inouye) (emphasis added).

That the Apology Resolution does not recognize or create a claim by native Hawaiians or Hawaiians to the ceded lands is further supported by Senate Report No. 103-126, of August 6, 1993. According to that report:

> The purpose of [the Apology Resolution] is to acknowledge the historical significance of the January 17, 1893 overthrow of the Kingdom of Hawaii on the occasion of the 100th anniversary of this event; to offer an apology to [n]ative Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, with the participation of citizens and agents of the United States; to commend efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with [n]ative Hawaiians; and to urge reconciliation efforts between the United States and the [n]ative Hawaiian people.

S. Rep. No. 103-126 at 1 (1993). The Senate Committee on Indian Affairs also reported that the Apology Resolution was expected to "have no

regulatory or paperwork impact," *id.* at 35, and would "not result in any changes in existing law." *Id.*

The appropriate judicial interpretation of the Apology Resolution was identified at the trial stage in *Rice*, where the district court stated:

> [R]eliance on the 1993 Apology Bill is misplaced. While the United States expressed its deep regret to the [n]ative Hawaiian people for the federal government's participation in the overthrow of the Kingdom of Hawaii, and pledged to support reconciliation efforts, that bill did not create any substantive rights. In fact, the disclaimer at the bottom of the Apology Bill expressly states, that "[n]othing in this joint resolution is intended to serve as a settlement of any claims against the United States." . . . . The Apology Bill creates no specific [n]ative Hawaiian rights. Furthermore, . . . the Apology Bill does not establish a "policy" of reconciliation; it simply pledges U.S. support for such efforts.

Rice v. Cayetano, 941 F. Supp. 1529, 1546 n.24 (D. Haw. 1996), *rev'd on other grounds*, 528 U.S. 495 (2000).

In section 5(f) of the Admission Act, the statute admitting Hawaii as a state, the United States granted title to Hawaii of approximately 1.2 million acres of ceded lands under certain conditions. But the Apology Resolution is completely silent as to the Admission Act. The Apology Resolution merely notes: "Whereas on August 21, 1959, Hawaii became the 50th State of the United States." Apology Resolution.

The Supreme Court of Hawaii wrongly held that the Apology Resolution affected Hawaii's sovereignty over the ceded lands. The Apology Resolution does not contain any language amending, altering, modifying, or rescinding the Admission Act. And Senate Report No. 103-126 concluded that the Apology Resolution would not result in any change in laws. The Admission Act thus still provides Hawaii with the power to sell or otherwise dispose of the ceded lands.

A careful reading of Section 5(f) of the Admission Act does not distinguish native Hawaiians as being the sole beneficiaries of the ceded lands; nor does it require Hawaii to use the ceded lands for the betterment of native Hawaiians. Section 5(f) states that the ceded lands and proceeds from their sale or other disposition shall be held by Hawaii

> as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. **Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide**, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admission Act § 5(f) (emphasis added). Under the express terms of Section 5(f), the State of Hawaii may provide for the betterment of native Hawaiians, but that section does not compel race-conscious administration of the ceded public lands. Instead, it spells out five possible uses for the lands, without providing that any portion of those lands or the proceeds thereof must be set aside exclusively for the benefit of racial Hawaiians.

Indeed, when the ceded lands were annexed by the United States in 1898, they were committed to use for the benefit of all inhabitants of Hawaii, regardless of race. *See* Newlands Resolution (Revenues from ceded lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."). From its admission to the Union in 1959 until 1978, the State administered the lands and their proceeds in a race-neutral manner, allocating them principally to public education. Hawaii Senate Journal, Standing Committee Rep. No. 784, 1350-51 (1979).

Because the Newlands Resolution "does not touch upon the Hawaiian homelands," or result in "any changes in existing law," the court below incorrectly interpreted it as giving rise to a state duty to preserve the ceded lands for native Hawaiians pending some resolution of their race-based claims. Even if the Newlands Resolution or the Admission Act somehow intended for the ceded lands to be allocated according to race, such a directive is presumptively invalid. When a state governmental entity, such as the OHA, seeks to justify race-based remedies to cure the effects of past discrimination, the Court does not accept the government's mere assertion that the remedial action

is required. *Miller*, 515 U.S. at 922. Instead, the Court insists on a strong basis in evidence of the harm being remedied. *Id.* "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. Thus, OHA's claim that the State must be enjoined from transferring any part of the ceded lands pending resolution of the claims of native Hawaiians, claims which are based on racial classifications, is subject to judicial strict scrutiny.

CONCLUSION

It is time, once and for all, to put an end to the blatantly unconstitutional state and federal programs in Hawaii that grant race-based preferences in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment of the court below should be reversed.

DATED: December, 2008.

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AMICUS CURIAE BRIEF

B631
Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

No. 07-1372

In the Supreme Court of the United States

STATE OF HAWAII, ET AL.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Hawaii

BRIEF OF THE SOVEREIGN COUNCILS OF THE HAWAIIAN HOMELANDS ASSEMBLY, NA 'A'AHUHIWA, THE NATIVE HAWAIIAN BAR ASSOCIATION, HUI KAKO'O 'AINA HO'O PULAPULA, AND 'AHAHUI O HAWAI'I AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the Hawaii Supreme Court's order that an injunction be entered against the sale or transfer of ceded trust lands until the claims of Native Hawaiians to the ceded lands are resolved rests on state law.

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BRIEF OF THE SOVEREIGN COUNCILS OF THE HAWAIIAN HOMELANDS ASSEMBLY, NA 'A'AHUHIWA, THE NATIVE HAWAIIAN BAR ASSOCIATION, HUI KAKO'O 'AINA HO'O PULAPULA, AND 'AHAHUI O HAWAI'I AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Amici are Hawaiian organizations that advocate justice for and the self-determination of the Hawaiian people, seeking to advance their collective land and cultural rights. Ensuring the integrity of the ceded lands trust at issue in this case is an integral part of *amici*'s missions.[1]

The Sovereign Councils of the Hawaiian Homelands Assembly (SCHHA) is an umbrella organization that represents 24 Hawaiian Homestead Associations that, in turn, represent over 30,000 Native Hawaiian homesteaders. The members of SCHHA are Native Hawaiians who lease trust lands pursuant to the homestead program that Congress created in the Hawaiian Homes Commission Act, 42 Stat. 108 (1921). As Native Hawaiian homesteaders, SCHHA members are direct beneficiaries of the ceded lands trust under § 5(f) of the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 6 (1959), and under art. XII, § 4 of the Hawaii State Constitution.

Na 'A'ahuhiwa is an association of retired Native Hawaiian state judges organized to advise and advo-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

cate on issues affecting Native Hawaiians, including those related to the ceded lands trust.

The Native Hawaiian Bar Association (NHBA) is a membership organization of Native Hawaiian lawyers, judges, and other legal professionals. NHBA provides a forum for discussion of legal issues affecting Native Hawaiians, and its members have extensive experience with Hawaii state trust law as it pertains to the ceded lands trust.

Hui Kako'o 'Aina Ho'opulalpula was formed to support applicants for Hawaiian Home Lands while they wait for a lease to be awarded and homes built. The mission of the organization is to create opportunities for self-sufficiency by advocating for the rights of applicants and seeking accountability of trust assets.

'Ahahui o Hawai'i is the Native Hawaiian law student organization at the William S. Richardson School of Law, University of Hawai'i at Mānoa. 'Ahahui members seek to promote Native voices in the debate over the legal status and rights of Native Hawaiians.

As advocates for beneficiaries of the ceded lands trust, *amici* have a direct and substantial interest in this matter. Reversal of the decision below would undermine their efforts to clarify and strengthen the legal rights of Native Hawaiians.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The judgment of the Hawaii Supreme Court in this case derives from principles of Hawaii state trust law. Although the federal Apology Resolution that is the centerpiece of petitioners' argument, Pub.

L. No. 103-150, 107 Stat. 1510 (1993), reprinted at Pet. App. 103a-111a, served to inform the court's findings of fact, it was ultimately the State's fiduciary obligations to Native Hawaiians[2] under state public trust law that shaped the court's opinion and determined its judgment. Contrary to petitioners' suggestion, the Hawaii Supreme Court did not place a cloud on the legal title to any land. Rather, the court ordered the entry of an injunction against selling or otherwise transferring to third parties any ceded trust lands until the claims of Native Hawaiians to those lands have been resolved through the political process. Pet. App. 100a. That judgment was firmly grounded in principles of state equity jurisprudence. Because the decision below rests on an application of state law and the Hawaii court's discussion of the Apology Resolution was not essential to its holding, there is no controlling issue of federal law in the case for this Court to resolve. The case accordingly should be dismissed, either for lack of jurisdiction or because certiorari was improvidently granted.

I. This Court has long recognized that its "power is to correct wrong judgments, not to revise opinions. * * * [I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117,

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[2] This brief uses the phrase "Native Hawaiian" to refer to "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Pet. App. 110a-111a (Apology Resolution). As discussed at note 5 *infra*, terms such as "Hawaiian" and "native Hawaiian" may have distinct meanings in the various statutes discussed herein.

126 (1945). These principles should guide the Court in its consideration of the present controversy. In *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983), the Court determined that where a state-law ground is not clear from the face of a state court's opinion, the Court would adopt a "presumption[]" that the decision rests on federal grounds. *Id.* at 1042 n.8. But the Court also recognized that there would be circumstances in which application of that presumption would be inappropriate. *Id.* at 1041 n.6; see also *Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378 (1984). The *Michigan* v. *Long* presumption has never governed when a state supreme court, applying state trust law and state-law principles of equity, relies on a hortatory Joint Resolution of Congress that does not have the force of law for a finding of legislative fact supporting the issuance of an injunction. In these highly unusual circumstances, the *Michigan* v. *Long* presumption should give way to a more probing inquiry into whether the invocation of federal law was of outcome-determinative significance to the state court.

When considered in this light, it is clear that the Hawaii Supreme Court's references to the federal Apology Resolution played no outcome-determinative role in its judgment and that review by this Court accordingly would "amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126. Although plaintiffs invoked the Apology Resolution in framing the factual basis for their complaint, and the Resolution informed the Hawaii Supreme Court's appreciation of how Native Hawaiians' claims pertaining to the *legal* title to land held in the ceded lands trust might ultimately be resolved, it is that court's *equitable* judgment that is before the Court now. The OHA respondents made clear in their filings before

the Hawaii Supreme Court that OHA is "*not* asserting ownership of Ceded Lands * * * or asking [the Hawaii Supreme] Court to resolve Native Hawaiian claims. It is *not* requesting damages or a quiet title." Pl.-App. OHA Opening Br. to the Haw. Sup. Ct. at 5. Rather, plaintiffs below sought, and the court below issued, "injunctive relief * * * seek[ing] preservation of the status quo." *Ibid.*

Respondents have offered one reason why the injunction ordered by the court below is supported by a state ground that is adequate and independent of the Apology Resolution: The injunction was designed to prevent irreparable damage to Native Hawaiians until their claims are resolved through the state political process. In this Brief, *amici* offer a second adequate and independent state ground supporting the injunction. Whether or not Native Hawaiians have legal title to all or any portion of the ceded trust lands, they unquestionably have a *beneficial equitable* interest in the lands held in trust. For the State, as trustee, to alienate the lands to third parties before determining whether the equitable interests of Native Hawaiians require that some portion of these lands be allocated to them in kind would be a breach of trust. The Apology Resolution was not necessary for the Hawaii Supreme Court to reach that determination and to conclude that state-law principles of equity required that an injunction issue to protect the beneficial interests of Native Hawaiians. That equitable holding derives directly from well-settled Hawaii law giving "native Hawaiian beneficiaries of the ceded lands trust * * * a 'right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating terms of the ceded lands trust'" and to enforce the State's "high fiduciary duties nor-

mally owed by a trustee to its beneficiaries." Pet. App. 39a.

II. Under state trust law, the court below had ample reason, wholly apart from the Apology Resolution, to conclude that the State's fiduciary duties as trustee of the ceded lands would be breached if alienation of the disputed parcel to third parties were permitted before the claims of Native Hawaiians had been resolved. Native Hawaiians have a substantial claim, under general principles of trust and equity law, to receive an allocation of the ceded trust lands in their capacity as statutory beneficiaries of the trust. This substantial beneficial or equitable claim exists, and fully justifies the injunction entered below, whether or not the legal claims that Native Hawaiians have advanced to these lands based on unextinguished aboriginal rights are ultimately vindicated.

Under well-established Hawaii law, the State must take care to administer the trust solely in the interest of its beneficiaries, use reasonable skill and care to make the trust property productive, and deal impartially between the trust's two beneficiaries, Native Hawaiians and the general public. By the same token, the special attachment Native Hawaiians continue to have to their homelands creates a unique relationship with the corpus of the ceded lands trust. Under these circumstances, discharge of the State's fiduciary obligations, whether through the actions of a court or of the political branches, will likely involve transfer of at least some of the lands in the ceded lands trust to Native Hawaiians, rather than a purely monetary settlement. The Hawaii Supreme Court therefore correctly determined, as a matter of state law, that the State's administration

of the trust must recognize and account for this special value the Native Hawaiian trust beneficiaries place on the lands.

III. Where a trustee intends to violate its fiduciary duties in a manner that might irreparably damage the beneficiary, equity demands injunctive relief. An irrevocable sale of the lands pending resolution of Native Hawaiian claims would cause irreparable damage to Native Hawaiian beneficiaries of the trust. Furthermore, following the invalidation (in separate litigation) of state legislation that attempted to define the nature of the ceded land trust, Hawaii's administration of the lands trust is infected by uncertainty as to the precise corpus within the trust. The court below properly enjoined sale of the corpus of the trust until the State takes steps to resolve these uncertainties.

Although petitioners and the United States as *amicus* devote substantial attention to questions surrounding legal title to the ceded lands, the *judgment* before this Court on certiorari pertains only to an equitable determination that the trustee should not alienate the trust corpus pending final determination of the substantial equitable claims of Native Hawaiians to those lands. That judgment is securely grounded in principles of state law and should not be disturbed. The case accordingly should be dismissed for lack of jurisdiction because the holding below rests on state law; alternatively, the writ of certiorari should be dismissed as improvidently granted because, given the state law governing the plaintiffs' equitable claims, a ruling by this Court would not affect the ultimate disposition of the case.

ARGUMENT

Hawaii law provides that the availability of an injunction is governed by a familiar three-part test:

> [1] [W]hether the plaintiff has prevailed on the merits; [2] whether the balance of irreparable damage favors the issuance of a permanent injunction; and [3] whether the public interest supports granting such an injunction.

Pet. App. 99a-100a.

The Hawaii Supreme Court, in the judgment entered below, properly applied state law to conclude that all three prongs of this standard for entry of injunctive relief had been satisfied by respondents. This conclusion is compelled without regard to the federal Apology Resolution, and indeed would be compelled even if the Apology Resolution had never been adopted. It follows that the Apology Resolution played no outcome-determinative role in the case, the holding below rests entirely on state law, and the writ of certiorari should be dismissed.

I. WHOLLY APART FROM THE APOLOGY RESOLUTION, NATIVE HAWAIIANS HAVE AN EQUITABLE INTEREST IN THE CEDED TRUST LANDS.

Under well-settled principles of equity and trust law, where the State as trustee is prepared to dispose of a trust res in a manner that could irreparably harm a beneficiary, a court of equity should enjoin that disposition pending a final determination of the beneficiary's interest. Because it is clear under Hawaii law that the State is the trustee for the ceded lands trust, and that Native Hawaiian peoples are

among the beneficiaries of that trust, respondents' success on the merits was assured even in the absence of the Apology Resolution. As it is clear that the Hawaii Supreme Court's equitable determination did not require conferring any legal significance on the Apology Resolution, this Court should not disturb the judgment below, even if it disagrees in some respects with the way the Hawaii Supreme Court characterized the Resolution.

A. The Hawaii Constitution And State Statutes Codify Congress's Delegation of Substantial Portions Of Its Trust Responsibility For The Ceded Lands To Hawaii.

A body of federal and state law predating the Apology Resolution determines the State of Hawaii's obligations in administering the ceded lands trust. The State's obligations as trustee of the ceded lands trust were first established in the federal Admission Act granting Hawaii statehood and have been further developed and refined by the State of Hawaii in its Constitution and statutes. The Hawaii Supreme Court has interpreted the trust to bind the State of Hawaii, in its trustee capacity for Native Hawaiians, to the high standard of duty owed by a fiduciary to the beneficiary of a private trust. That court has further held that the State must take care to administer the trust solely in the interest of its beneficiaries, use reasonable skill and care to make the trust property productive, and deal impartially between the beneficiaries.

The unique nature of the trust held by the State of Hawaii for Native Hawaiians originates in the federal government's own trust relationship with Native Hawaiians. The federal trust for Native Hawai-

ians grows out of Congress's Indian affairs powers and has been defined and reinforced by a history of special legislation enacted by Congress on behalf of Native Hawaiians.[3] Because Congress has delegated substantial portions of its trust responsibility to the State of Hawaii, the State has embedded in its constitutional and statutory law a special concern for Native Hawaiian interests that reflects both federal and state trust standards, as well as the unique historical and political role Native Hawaiians have played in Hawaii's society.

The United States' tumultuous interactions with Native Hawaiians have been recounted by this Court at length. See *Rice* v. *Cayetano*, 528 U.S. 495, 499-507 (2000). As pertinent here: Several years after a group of American businessmen, acting in league with the United States Minister to Hawaii and United States Armed Forces, toppled the Hawaiian monarchy, Congress extended formal recognition to the provisional government in the Joint Newlands Resolution of 1898. See Felix S. Cohen, *Handbook of Federal Indian Law* 801 (1982 ed.). The Newlands Resolution ceded 1.8 million acres of formerly Hawaiian "public, government, or Crown lands" to the United States government. J. Res. 55, 55th Cong., 30 Stat. 750 (1898). Two years later, Congress created the Territory of Hawaii, placing the ceded lands under direct federal control and instructing that any proceeds from the lands be used to benefit education and other public purposes in Hawaii. Hawaiian Organic Act, 31 Stat. 141 (1900).

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[3] See, *e.g.*, Native Hawaiian Education Act, 20 U.S.C. §§ 7511 *et seq.* (2006); Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701 *et seq.* (2006).

In 1920, in an effort to redress the rapidly declining economic and social status of Native Hawaiians, Congress placed 200,000 acres of the ceded lands into a trust administered by the Hawaiian Homes Commission, a subdivision of the new territorial government. Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921). Upon Hawaii's admission to statehood in 1959, Congress transferred responsibility for the 200,000-acre land trust to the State of Hawaii to continue the Hawaiian homesteading program, requiring the new State to adopt the provisions of the HHCA into its constitution. Act of Mar. 18, 1959 (Admission Act), Pub. L. No. 86-3, 73 Stat. 4 (providing for the admission of the State of Hawaii into the Union).

The Admission Act granted the remainder of the ceded lands—some 1.2 million acres—to the State of Hawaii under a public trust bound by strict conditions:

> [T]ogether with the proceeds from the sale or other disposition of any such lands and the income therefrom, [the granted lands] shall be held by said State as a public trust: [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible, [4] for the making of public improvements, and [5] for the provision of lands for public use.

Admission Act, § 5(f).

Congress has continued to delegate various elements of its trust relationship with Native Hawaiians to the State of Hawaii. In the Native Hawaiian Education Act, for example, Congress specifically delegated to Hawaii the duty to "develop innovative educational programs to assist Native Hawaiians" and to "supplement and expand programs and authorities in the area of [Native Hawaiian] education." 20 U.S.C. § 7513(1), (3). It affirmed in 1994 and again in 2002 that it has "delegated broad authority" to the State of Hawaii "to administer any portion of the Federal trust responsibility." 20 U.S.C. § 7512(12)(c).

Since 1959, Hawaii law has further elaborated upon the trust obligations created at the time of Hawaii's admission to the Union. Constitutional amendments in 1978 effected fundamental alterations to the State's implementation of the § 5(f) trust language. See *Office of Hawaiian Affairs* v. *State* [*OHA I*], 31 P.3d 901, 903 (Haw. 2001). The amendments clarified that the ceded land trust has two distinct beneficiary groups: Native Hawaiians and the general public. Haw. Const. art. XII, § 4. The amendments also established the Office of Hawaiian Affairs (OHA), a new and separate division within the state government,[4] to administer a portion of the revenues from the ceded land trust on behalf of "na-

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[4] The Hawaii Supreme Court has described OHA as a "self-governing corporate body" and "receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians." *Trustees of the Office of Hawaiian Affairs* v. *Yamasaki*, 737 P.2d 446, 452-453 (Haw.), *cert. denied*, 484 U.S. 898 (1987). OHA may sue and be sued, and enter into contracts. Haw. Rev. Stat. § 10-4 (2006).

tive Hawaiians" and "Hawaiians."[5] *Id.* art. XII, § 5. Statutes enacted subsequently set forth the purposes and duties of OHA and endowed it with 20 percent of any "funds derived from" the ceded lands trust. Haw. Rev. Stat. § 10-13.5 (2006).

B. Hawaii State Courts Have Repeatedly Recognized That The State Of Hawaii Acts As Fiduciary And Trustee For Native Hawaiians.

Hawaii's state courts have consistently affirmed and construed the State's trust responsibilities for Native Hawaiians under state trust law. The Hawaii Supreme Court has interpreted the State's duties to Native Hawaiians—which encompass the ceded lands trust along with other areas of responsibility—as the "high fiduciary duties normally owed by a trustee to its beneficiaries." *Ahuna* v. *Dep't of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982); see also *Pele Defense Fund* v. *Paty*, 837 P.2d 1247, 1264 (Haw. 1992) (applying *Ahuna*'s reasoning to the ceded lands trust; see *infra* at 21).

In *Ahuna*, the Hawaii Supreme Court defined the extent and nature of the trust relationship between the State of Hawaii and Native Hawaiians under the Hawaiian Homes Commission Act. The court held that the substance of the trust should be informed "by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native

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[5] For purposes of OHA, state law defines "Native Hawaiian" as a Hawaiian with at least 50% blood quantum descended from races inhabiting Hawaii in 1778, and "Hawaiian" as a descendent of an inhabitant of Hawaii in 1778. Haw. Rev. Stat. § 10-2 (2006).

Americans." 640 P.2d at 1168. Noting that this Court has described the trust relationship between Native Americans and the United States as one "measured by the same strict standards applicable to private trustees," *United States* v. *Mason*, 412 U.S. 391 (1973), the Hawaii Supreme Court derived from federal trust and Indian jurisprudence three fundamental trust obligations owed by the State of Hawaii to Native Hawaiians. The first is the duty to "administer the trust solely in the interest of the beneficiary." *Ahuna*, 640 P.2d at 1169 (citing *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981)); see also *Pele Defense Fund*, 837 P.2d at 1264 (quoting *Ahuna*); *OHA* v. *State*, 133 P.3d 767, 784 (Haw. 2006) (same). Second is the duty "to use reasonable skill and care to make trust property productive" and "to act as an ordinary and prudent person would in dealing with his own property." *Ahuna*, 640 P.2d at 1169 (citing *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973); *Rippey* v. *Denver U.S. National Bank*, 273 F. Supp. 718 (D. Colo. 1967)). And third, the State has a duty to "deal impartially" when responsible for acting on behalf of two or more beneficiaries. *Ibid.*

In *Pele Defense Fund* v. *Paty*, 837 P.2d at 1264, the Hawaii Supreme Court confirmed that "[t]he State owes th[e] same high standard [articulated in *Ahuna*] to the beneficiaries of the ceded lands trust."

The judgment below is the culmination of the *Ahuna/Pele* line of cases. Those authorities establish that the State of Hawaii, as trustee of the ceded lands, must dispose of the lands in such a way as to protect the equitable claims of Native Hawaiians as one of the principal beneficiaries of the trust. The judgment below is therefore not dependent upon any

determination, grounded in the Apology Resolution or otherwise, that Native Hawaiians have an unextinguished legal title to the lands that predates the creation of the trust. The judgment is fully supported by the beneficial or equitable interests of Native Hawaiians in the ceded public lands, which the State as trustee has a fiduciary obligation to protect.

C. Native Hawaiians Have A Special Interest In Ownership Of Their Lands That Transcends The Lands' Monetary Value.

The interests of Native Hawaiians in the ceded public lands are not merely monetary in nature. Native Hawaiians have a special bond with the lands held in trust, and this bond would be broken by alienation of the lands to third parties. Where a trust beneficiary maintains a special bond to land held in trust, the trustee's fiduciary responsibilities demand more than mere maximization of value. Hawaii, acting as trustee, must also protect the equitable or beneficial interest that Native Hawaiians have in preserving the lands themselves.

1. Hawaii Trust Law Recognizes Special Native Hawaiian Rights To Enjoyment Of Lands.

a. Native Hawaiians harbor unique attachment to the lands of Hawaii. Their spiritual and cultural connection with Hawaiian lands predates Western arrival to the island by more than a thousand years. Their welfare continues to be intricately intertwined with the lands that once sustained their culture and religious practice, and are now held in trust by the State of Hawaii for what remains of their community. As trustee, the State acts as a steward and protector of both the lands of Hawaii and the interests of

the Native Hawaiian people. In addition, Native Hawaiians maintain various unsettled claims to lands within the ceded lands trust. To the extent that they are entitled to use or possession of particular parcels within the trust, either as a matter of right or in the exercise of the State's sound discretion as trustee—a question not decided by the court below—it could breach the State's fiduciary duty for it to sell those parcels prior to a resolution of such claims.

Anthropologists date the first settlement in Hawaii as early as 300 A.D. Patrick Kirch, *Feathered Gods and Fishhooks* 348 (1985). Prior to the arrival of Westerners in Hawaii in 1778, Native Hawaiians participated in a complex and interdependent system of land allocation that centered around land use rights. Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 849 (1975). Although organized into larger administrative divisions, the basic Native Hawaiian landholding unit was the *ahupuaa*, an economically self-sufficient land unit governed by use rights. *Ibid.* The system was hierarchical in nature, with chiefs and sub-chiefs controlling larger divisions of land, while commoners enjoyed small plots for their own use as well as gathering rights on non-cultivated lands. Cohen, *supra*, at 798-799. The concept of fee simple absolute did not exist in traditional Native Hawaiian society. *Ibid.*

Under this system, Native Hawaiians lived in reciprocity with their *'aina*, or land base, which they believed would sustain and nurture them so long as they properly cared for it. Under traditional Native Hawaiian belief, the *'aina* embodied the *akua*, or the gods. Lilikala Kame'eleihiwa, *Native Land and Foreign Desires: Pehea La e Pono Ai?* 23-25 (1991); see

also David Malo, *Hawaiian Antiquities* 241-244 (2d. ed. 1951). As the descendents of their gods, Native Hawaiians were responsible for tending to the *'aina* in a way that respected its sacred nature. Kame'eleihiwa, *supra*, at 23-25. Land thus could not be commodified or privately owned. Levy, *supra*, at 849. Natural resources were held in trust and managed for the common good, and private commercial uses were restricted to ensure they would not detract from the welfare of the community. *Ibid.*

b. These beliefs shaped Native Hawaiian practice and customary law up until the arrival of Western culture. Over the course of the nineteenth century, large, privately-owned cash crop plantations came to dominate the Hawaiian landscape, replacing the *ahupua'a* system. Cohen, *supra*, at 799-800. American and British interests controlled the great majority of these plantations and brought Western concepts of ownership and exclusion to Hawaii's land system. *Ibid.*

There is no doubt that Western rule has radically altered Native Hawaiians' relationship with their land. In addition to privatizing lands originally occupied by Native Hawaiians, Hawaii's post-1893 governments repeatedly banned many Native Hawaiian cultural and spiritual practices. See Apology Resolution, Pet. App. 103a-111a. Long separation of many Native Hawaiians from their lands impaired the cultural and spiritual connection they had maintained with it for generations. *Ibid.*

Notwithstanding these changes, however, Hawaii law has come to recognize the unique claims of Native Hawaiians to the land in several ways. The Hawaii Supreme Court has held that Native Hawaiians have the right to enter undeveloped lands

owned by third parties to enjoy "continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes," so long as no harm to private property occurs from this practice. See *Kalipi* v. *Hawaiian Trust Co.*, 656 P.2d 745, 748 (Haw. 1982) (citing Haw. Const. art. XII, § 7, which grants to tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a*").

Various state statutes also acknowledge the importance of preserving traditional Hawaiian custom and precedent, requiring, for example, the consideration of cultural impacts on Native Hawaiians under the state's NEPA-equivalent environmental assessment requirements. Haw. Rev. Stat. § 343-2 (2008).

In *Ka Pa'akai O Ka 'Āina* v. *Land Use Commission*, the Hawaii Supreme Court evaluated a challenge by Native Hawaiians to the state Land Use Commission's decision to reclassify 1000 acres of trust land on Hawaii island's Kona coast for tourism and commercial uses. 7 P.3d 1068 (Haw. 2000). The court vacated the commission's decision, ruling that Hawaii state agencies must "protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians" and "not act without independently considering the effect of their actions on Hawaiian traditions and practices." *Id.* at 1083. The court delineated three specific findings that the State must make before it may reclassify land:

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian

> rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 1084 (footnotes omitted).

2. Any Authority To Sell Ceded Lands Must Be Exercised Consistent With The State's Fiduciary Duties.

Petitioners argue that the Admission Act, the Hawaii Constitution, and Hawaii statutes all anticipate that the State will sell lands from the ceded lands trust. Pet. Br. 4-6, 26. But to say that the trustee has the *authority* to sell the trust res is only the beginning of the inquiry. Two conditions must be met before a trustee may sell property from the corpus of the trust in any given case: (1) the trust instrument must authorize the sale (either explicitly or implicitly), and (2) *the sale must be consistent with the trustee's fiduciary duties.* See Restatement (Third) of Trusts § 190 (1992). While the State might be able to satisfy the first condition, it cannot hope to satisfy the second.

To sell property from the corpus of the estate, the trustee must find express or implied authorization in the trust instrument. See *In re Estate of Campbell*, 1958 WL 9932 (Haw. Terr. June 20, 1958); see also Restatement (Third) of Trusts § 190. But even where such authorization has been conferred, the trustee's authority to dispose of trust property is not unfet-

tered. It is elementary that a trustee may not exercise granted powers in a way that is detrimental to the trust beneficiaries. Specifically, sales of trust property may only be made if they do not conflict with the trustee's other fiduciary duties. See Haw. Rev. Stat. § 554A-3(b) (2006) ("In the exercise of the trustee's powers including the powers granted by this chapter, a trustee has a duty to act with due regard to the trustee's obligation as a fiduciary * * * ."); see also *In re Estate of Campbell*, 1958 WL 9932, at *12 (holding that where the trust instrument gives the trustee the authority to sell, any person questioning that sale has the burden to produce evidence to overcome a "presumption of regularity and good faith" on the part of the trustee, but that where such evidence is produced, the trustee bears "the ultimate burden of establishing the regularity and good faith of the questioned action by a preponderance of the evidence"); *Powell on Real Property* § 42.05 (2008) ("[I]f the trust instrument gives the trustee the power, but not the obligation to sell, the courts will examine any sale to see if the trustee abused her discretion.").

Authority to sell is therefore a necessary but not sufficient condition for sale. Here, any sale of lands from the ceded lands trust will dissipate the corpus of the trust. Such dissipation is lawful only if consistent with the State's fiduciary duty to protect the beneficial interest of Native Hawaiians in preserving the ceded lands. Consequently, directing a sale of lands before the beneficial rights of native Hawaiians are resolved would be a breach of trust.

3. *Prior To This Case, Hawaii Courts Had Never Determined Whether A Sale of Ceded Lands Amounted To A Breach of Trust Under Hawaii Law.*

Petitioners argue that "[f]or decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its 'public trust' obligations * * * ." Pet. Br. 26. This argument again confuses the question whether the State as trustee had the legal *power* to alienate lands—which is not disputed—with the question whether such alienation is consistent with its trust obligations. Prior to the Hawaii Supreme Court's decision below, no Hawaii court had ruled on the question of whether sale of the ceded lands amounts to a breach of trust given the Native Hawaiians' claim to the land.

Indeed, 16 years ago, in the case most closely resembling the one at hand, the Hawaii Supreme Court indicated that prospective relief might be available to prevent a sale of ceded lands in violation of the State's trust obligations. In *Pele Defense Fund*, a Hawaii nonprofit corporation challenged the State's decision to exchange ceded lands for other lands. Among other claims, the plaintiffs asserted that the exchange was a breach of trust under Hawaii trust law and the Hawaii Constitution. 837 P.2d at 1261-1264. The court held that the State had fiduciary duties and obligations as the trustee of the ceded lands:

> The decision of this court will not render these provisions meaningless and will not leave the people of Hawaii without the means to hold their government to these promises. Therefore, we hold that [plaintiff] has a right

> to bring suit under the Hawaii Constitution to *prospectively* enjoin the State from violating the terms of the ceded lands trust.

Id. at 1262 (emphasis added). The court went on to hold, however, that no relief was available in *Pele Defense Fund* because the plaintiff was "not seeking to prospectively enjoin a constitutional violation in this case, but would have us turn back the clock and examine actions already taken by the State. The doctrine of sovereign immunity deters judges from this course * * * ." *Ibid.*

In the present case, the court below determined that, unlike in *Pele Defense Fund*, sovereign immunity did not bar the plaintiffs' claims. Pet. App. 45a-53a, 63a-69a. Thus, for the first time, the court was able to reach the merits of a claim for breach of trust in connection with the sale of ceded lands, and correctly determined that any such sale would constitute a breach of trust.

II. NATIVE HAWAIIANS WOULD SUFFER IRREPARABLE DAMAGE IF TRUST LANDS WERE ALIENATED PRIOR TO A SETTLEMENT OF THEIR CLAIMS.

Native Hawaiians have established two types of irreparable damage they would suffer if the State were allowed to dispose of ceded lands at the present time. First, due to their unique relationship with the Hawaiian lands (described above), unilateral alienation of the ceded lands by the State will permanently impair their interest in the land itself. Second, because the State has failed to provide Native Hawaiians with an accounting of their interest in the ceded lands trust, in violation of the State's fiduciary duties, the rights of Native Hawaiians could be perma-

nently impaired if lands are sold before a proper accounting takes place.[6]

A. Native Hawaiians Will Suffer Irreparable Damage If The State Alienates Trust Lands Without Regard To Native Hawaiians' Historic Attachment To Those Lands.

Basic principles of equity compel an injunction against the sale of property from a trust while a dispute is pending, where such sale would preclude vindication of the beneficiary's position in the dispute. Those principles apply with special force where, as here, the beneficiary Native Hawaiians have a special connection to the land held in trust for their benefit:

> Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property * * * . [E]quitable remedies of all kinds to enforce trusts * * * and fi-

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[6] It is not clear petitioners even deny the existence of irreparable damage. Petitioners focus on their argument that "Native Hawaiians have no *legal* claim to the ceded lands that federal law permits any court to recognize," Pet. Br. at 19-20, yet admit that "Native Hawaiians have a clear *moral* basis for asking the political branches to grant them recompense." But respondents' position, both here and in the court below, is that they are "*not* asserting ownership of Ceded Lands * * * or asking [the courts] to resolve Native Hawaiian claims" and "*not* requesting damages or a quiet title," but rather request "preservation of the status quo" while the political branches reach a conclusion on the legal title question. Pl.-App. OHA Opening Br. to the Haw. Sup. Ct. at 5. The "*moral* basis" petitioners concede is precisely the irreparable damage Native Hawaiians will suffer if trust lands are alienated precipitously.

> duciary duties concerning specific property * * * would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer, or encumbrance of such property[.]

Pomeroy on Equity Jurisprudence § 1339 (1994). Thus, "in general, in all suits to enforce an equitable right against specific property, * * * the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action." *Id.* § 1340; see also 42 Am. Jur. 2d *Injunctions* § 52 (2008) ("A court of equity will interpose by injunction to prevent the transfer of a specific thing which, if transferred, will be irretrievably lost to the owner, such as * * * a conveyance or transfer by a trustee in violation of the trust * * * ." (internal citations omitted)).

This principle applies with special force to real property. Courts are more likely to find a prohibition against selling trust property where that property is land to which the settlor or the beneficiaries have a special relationship. See, *e.g.*, Restatement (Third) of Trusts § 190 cmt. d (1992) ("There is a greater reluctance in the trust law to find a duty to retain land that had been purchased by the settlor for purposes of investment than to find a prohibition against sale of land that had been occupied as a residence by the settlor and his or her family, especially when the beneficiaries are members of the family.").[7]

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[7] In *In re Estate of Campbell*, 1958 WL 9932 (Haw. Terr. June 20, 1958), the court found that the trust instrument (a will) contained an implied power to sell lands from an estate. Although the court equated the transaction at issue to a sale of real property, it actually involved only a sale of topsoil, rock, and sand,

Two doctrines of Hawaii law recognize the special relationship between a property-owner and his or her property, as well as the reality that real property is more likely to be irreplaceable than other forms of property. First, in a breach of contract action involving the sale of real property, courts are likely to award specific performance. See *Kalinowski* v. *Yeh*, 847 P.2d 673, 678 (Haw. App. 1993) ("[I]t is a well accepted principle that where the parties have fairly and understandingly entered into a valid contract for the sale of real property, specific performance of the contract is a matter of right and equity will enforce it * * * ." (internal quotes omitted)); see also *Hurst* v. *Kukahi*, 25 Haw. 194 (Haw. Terr. 1919); Restatement (Second) of Contracts § 360 cmt. e (1981) ("Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money."). If these doctrines are applicable in routine land disputes, they must surely control in the context of unique aboriginal connections to public trust lands.

Second, in the event of a partition of real estate, Hawaii property law favors partition in kind over sale. Haw. Rev. Stat. § 668-1 (2008) (expressing preference for a partition in kind unless "it appears that a partition cannot be made without great prejudice to the owners"); see also *Pomeroy on Equity Jurisprudence* § 1390 (1994) ("As between a sale and a partition, however, the courts will *favor* a partition as not disturbing the existing form of the inheritance.").

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and not a permanent and irrevocable alienation of real property as in the case at hand.

As Hawaii courts have made clear, the State's duty as trustee of the ceded lands trust is based on settled principles of state law. See *supra* at 13. Thus, the foregoing principles of trust, equity, property, and contract inform that duty.

A moratorium on all irrevocable transfers of ceded lands until the beneficial claims of Native Hawaiians to these lands can be properly addressed and resolved is an appropriate equitable device to ensure compliance with the State's trust obligations. This Court has upheld such moratoriums in the past. See *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (restraining the Secretary of Interior from listing or disposing of any Pueblo lands until Pueblo claims over these lands could be properly resolved); see also *Native Village of Allakaket* v. *Hickel*, Civ. Action No. 706-70 (D.D.C. Apr. 3, 1970), discussed in Sophie Thériault et al., *The Legal Protection of Subsistence*, 22 Alaska L. Rev. 35, 39 n.28 (2005) (enjoining the development of an Alaska pipeline through certain lands claimed by Native Alaskans until native claims over these lands were settled). Were Hawaii to sell the ceded lands before Native Hawaiians' beneficial claims to these lands are resolved, Native Hawaiians with claims would suffer the irreparable injury of potentially unlawful alienation of unique real property.

B. Native Hawaiians Suffer Irreparable Damage When The State Alienates Trust Lands Without Providing An Accounting Of Their Rights Under The Trust.

Native Hawaiians would suffer a second form of irreparable damage upon premature sale of trust lands because the State has not fulfilled its fiduciary duty to inform them of their rights under the trust. Under Article XVI, § 7 of the Hawaii Constitution,

"'it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust.'" *Office of Hawaiian Affairs* v. *State [OHA II]*, 133 P.3d 767, 795 (Haw. 2006) (quoting *Office of Hawaiian Affairs* v. *State [OHA I]*, 31 P.3d 901, 914 (Haw. 2001)). The state courts have held that the State is in breach of this fundamental constitutional and fiduciary duty, and this breach necessitates the injunction issued below.

As a matter of Hawaii constitutional and common law, the State has a "duty to inform" Native Hawaiians of their rights under the public lands trust. *OHA II*, 133 P.3d at 784. This obligation accords with the basic principle of trust law that a beneficiary "is entitled to know what his rights under the trust are and what the status of the trust administration is, so that he can secure performance of the trust or redress for a breach." G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 861, p. 9 (2d rev. ed. 1982). In recognition of this principle, the Hawaii Supreme Court has found that the State has a fiduciary duty to give Native Hawaiians "complete and accurate information as to the nature and amount of trust property." *OHA II*, 133 P.3d at 784 (internal citations and emphasis omitted).

Native Hawaiian beneficiaries have a particularly strong interest in a full accounting of their rights under the public lands trust. As the land transaction that gave rise to this suit illustrates, the State is frequently on both sides of contracts that alienate public lands. Because the state legislature must balance Native Hawaiians' interests against those of the general public, there is a pressing need for a judiciary "vested with the responsibility to en-

sure" that the State "uphold[s its] fiduciary duties." *Id.* at 795. This type of judicial oversight is only possible, however, if Native Hawaiians have the information they need to assert their beneficial rights in court.

Yet despite the State's clear fiduciary duty to inform, Native Hawaiians' rights under the trust remain ill-defined. There are at least two major areas of trust law that are currently unsettled: *which* lands are part of the trust res and the *amount* of trust revenue to which Native Hawaiians are entitled. The Hawaii Legislature recently recognized this uncertainty, directing the state attorney general to enter negotiations with OHA over some of these issues. 2008 Haw. Sess. Laws Act 158, § 8 ("[T]he attorney general * * * shall resume negotiations * * * to resolve the dispute concerning the * * * proceeds from the * * * public trust that the [Office of Hawaiian Affairs] should have received * * * pursuant to * * * the state constitution."). Until the state legislature clarifies the scope of Native Hawaiians' beneficial interest, however, an injunction is essential to prevent alienation that might otherwise irreparably injure Native Hawaiians.

In 1978, Hawaii voters approved a constitutional amendment that specifies that the ceded lands trust is "held by the State * * * for native Hawaiians and the general public." Haw. Const. art. XVI, § 7. Shortly thereafter, the state legislature attempted to give effect to this provision by promising Native Hawaiians "[t]wenty percent of all funds derived from the public land trust." Haw. Rev. Stat. § 10-13.5 (2006). By enacting Section 10-13.5, the legislature sought to fulfill the State's constitutional and fiduciary duties to Native Hawaiians by specifying the

portion of trust revenues to which they are entitled. Litigation designed to compel a complete accounting of the trust res under Section 10-13.5 failed, however, when the suit was dismissed as presenting a nonjusticiable political question. *Trustees of the Office of Hawaiian Affairs* v. *Yamasaki*, 737 P.2d 446 (Haw. 1987).

Recognizing the uncertainty created by Section 10-13.5 and the *Yamasaki* decision, the Hawaii Legislature in 1990 passed Act 304. This Act clarified important elements of the trust by specifying which lands were part of the trust res and how much trust revenue Native Hawaiians should receive. 1990 Haw. Sess. Laws Act 304.

Because it constituted a difficult political compromise, Act 304 included a non-severability provision that required the Act be invalidated in its entirety if federal law ever preempted its application.[8] In 2000, the Hawaii Supreme Court ruled in *OHA I* that federal regulations preempted the Act's award of certain airport revenues to OHA.[9] As a result, Act

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[8] Section 16 of Act 304 provides:

> The provisions of the Act are not severable and if any provision of the Act, or the application thereof to any * * * circumstance is held to conflict with any federal * * * law, rules, or regulations, this Act, in its entirety, shall be invalid.

1990 Haw. Sess. Laws Act 304, p. 953.

[9] The Honolulu International Airport sits on trust lands, and thus Act 304 would have entitled Native Hawaiians to twenty percent of its revenue. Federal law, however, requires airport owners to use "revenues generated by [the] airport * * * for the capital or operating costs of the airport, the local airport system, or other local facilities * * * directly related to the actual transportation of passengers or property." Airport and Airway

304 was "effectively repealed," and the Hawaii courts were again "left with no judicially manageable standards by which to determine whether OHA is entitled to * * * specific revenues." *OHA I*, 31 P.3d at 914.

With Act 304 invalidated, the state legislature has a renewed duty to clarify Native Hawaiians' rights under the trust. The injunction in this case requires the State to fulfill its fiduciary responsibilities to do so.

III. THE PUBLIC INTEREST SUPPORTS THE INJUNCTION ENTERED BELOW.

In the unique posture of this case, the public-interest prong of Hawaii's permanent injunction standard effectively merges with the analysis of irreparable injury. The duties plaintiffs seek to enforce here derive directly from the Hawaii Constitution, the Admission Act that created Hawaii as a state, and important state doctrines concerning land management. The public-interest analysis thus favors the injunction for the same reasons, and to the same extent, as does the "balance of irreparable damage" analysis.

Moreover, the Hawaii Supreme Court indisputably resolved the public-interest prong of its own analysis with reference *only* to state law. Pet. App. 94a ("Here, we need look no further than the legislative pronouncement contained in [Hawaii] Act 329 * * * to conclude that the public interest supports granting an injunction."). As this case comes to the

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Improvement Act, 49 U.S.C. § 47107(b)(1). Because the *OHA I* court found application of Act 304 to conflict with this federal statute, it held the Act invalid in its entirety.

Court, that determination is not subject to further review.

* * * *

The judgment of the Hawaii Supreme Court rests firmly on state-law principles of trust law and equity. The Apology Resolution provided useful and interesting background for the state court's decision, but construction and application of the Apology Resolution was not the basis for, and was in no respect essential to, the holding below. There accordingly is no reason to believe that anything that this Court could say about the Apology Resolution would lead the litigation to a different outcome or have any effect on the ultimate disposition of the case. For these reasons, the Court should dismiss the case for lack of jurisdiction, or dismiss the writ of certiorari as improvidently granted.

CONCLUSION

The case should be dismissed for lack of jurisdiction; alternatively, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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JANUARY 2009

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
DEC 11 2008
OFFICE OF THE CLERK

NO. 07-1372

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF HAWAII, *ET AL.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

AMICUS BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, AND WYOMING IN SUPPORT OF PETITIONER STATE OF HAWAII

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QUESTION PRESENTED

In the Joint Resolution To Acknowledge The 100th Anniversary Of The January 17, 1893, Overthrow Of The Kingdom Of Hawaii (1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993)), Congress acknowledged and apologized for the United States' role in that overthrow. The question presented is whether this resolution stripped Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—twenty-nine percent of the total land area of the state and almost all the land owned by the state—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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INTEREST OF THE AMICI CURIAE STATES

The Supreme Court of Hawaii concluded that Congress' 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993), "clearly recognized that the native Hawaiian people have unrelinquished claims" to Hawaii's state lands. Pet. App. 32a. It accepted the respondent's argument that title to the state "lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished" claims to the land. Pet. App. 26a. Based on its recognition of such claims, the court restrained the State of Hawaii from selling its lands until future political processes reconciled disputes raised by the native Hawaiian groups. Thus, the Hawaii court interpreted the 1993 Apology Resolution to strip Hawaii of sovereignty over lands the United States granted the new state in the 1959 Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

The amicus curiae states are deeply concerned with the lower court's conclusion that the Apology Resolution creates or recognizes claims that cloud the title to Hawaii's state lands. As part of the "solemn agreement" embodied in the admission act, every state admitted into the Union since 1802 has received grants of land from the United States. *See Andrus v. Utah,* 446 U.S. 500 (1980). The acreage granted to the states is substantial, and the lands and proceeds from the lands support vital state institutions and programs across the nation. "Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were

given in support of common schools." *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 460 n.3 (1967) (citing The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963)).

If the decision below is correct—that through a post-statehood resolution like the Apology Resolution the United States recognized claims that cloud title and eliminate authority to sell lands granted at statehood—then the legal force of state admission acts becomes doubtful and state sovereignty can be fundamentally undermined. The practical harm to the amici states would be significant, because the states rely on state lands to fund schools, institutions, and vital state programs. *See generally Lassen*, 385 U.S. at 460 (addressing grants that impose trust duties affecting granted lands and funds derived from such lands).

The risk of harm to the states, moreover, is quite real if a claim to state lands can be based on a resolution that, on its face, does nothing more than apologize on the 100th anniversary of a significant historic event and urge future conciliation among people. Congress should be free to recognize the historic faults of our nation and to offer an apology without being held to have impliedly created legal rights. An apology, such as the Apology Resolution, should not be held to undermine the grant of lands that formed a sovereign state of the Union.

SUMMARY OF ARGUMENT

The decision of the Hawaii Supreme Court should be reversed for three reasons. First, the decision is contrary to fundamental rules of statutory

construction. The 1959 Hawaii Admission Act granted Hawaii title to 1.2 million acres of lands formerly held by the United States Territory of Hawaii. The lands were granted subject to trust obligations imposed by Section 5(f) of the Admission Act and with unambiguous language allowing Hawaii to exercise full sovereignty and title. Pet. App. 116a. In contrast, the plain language of the Apology Resolution offers an apology; it does not repeal or amend the title and authority to manage and dispose of the lands provided by the Admission Act. Given an ordinary meaning, the Apology Resolution is harmonious with the Admission Act and does not repeal or recognize any claims to the lands granted to Hawaii at statehood.

Second, the decision below conflicts with this Court's decisions recognizing that Congress does not take land back after the land is granted at statehood. Congress did not redirect the use of the lands from the statehood grants to a new purpose—reconciliation of claims by native Hawaiian groups. Therefore, the court below erred in holding that the post-statehood apology affected title or state authority to manage lands granted at statehood.

Third, the decision below views the Apology Resolution in a manner that conflicts with the plan of federalism and the constitutional obligation of the United States not to interfere with the integrity of Hawaii as one of the sovereign states. Under the plan of federalism, the federal government cannot commandeer a sovereign state's lands to deal with present-day political claims made by descendents of native Hawaiians.

A. The Decision Below Fails To Adhere To Fundamental Rules Of Statutory Construction

The decision below interprets the 1993 Apology Resolution to strip Hawaii of title and authority over lands expressly granted to Hawaii in the 1959 Admission Act. In so holding, the court below failed to apply rudimentary rules of statutory interpretation. First, "[t]he starting point for our interpretation of a statute is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). Second, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (internal quotations marks omitted). Third, when reviewing acts concerning the same subject, the Court will "read the statutes to give effect to each . . . while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Finally, "a statute dealing with a narrow, precise, and specific subject", such as the Admission Act grant of lands for specific purposes, "is not submerged by a later enacted statute covering a more generalized spectrum," here, a general apology directed to historically significant events. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2532. In each of these respects, the decision below is flawed and should be reversed.

The Hawaii court sidesteps these fundamental rules of construction when it reads the Apology Resolution to recognize unrelinquished claims requiring Hawaii to hold its lands subject to native Hawaiian claims. The extraordinary consequences

found by the Hawaii court are nowhere expressed in the Apology Resolution. The resolution should be read in harmony with the provisions of the Hawaii Admission Act to preserve the state's lands, not to impliedly repeal the title and authority granted to Hawaii in the Hawaii Admission Act.

1. The 1959 Admission Act Expressly Granted The Lands To Hawaii When Its People Voted To Join The United States

In 1959, the people of Hawaii voted to join the Union as a state according to the terms of the 1959 Hawaii Admission Act. The people voted yes to the proposition that Hawaii immediately be admitted into the Union as a state. Pet. App. 119a. The voters specifically considered and approved the following statement: "All provisions of the [Admission Act] prescribing the terms or conditions *of the grants of lands* or other property therein *made to the State of Hawaii are consented to fully by said State and its people.*" Pet. App. 119a (emphasis added). Thus, when the people of Hawaii voted overwhelmingly to approve statehood, the voters expressly approved of the grants of land from the United States to their newly formed state.

The plebiscite incorporated by reference Section 5 of the Admission Act. Section 5 granted over 1.2 million acres for the support of the new state. Pet. App. 115a–17a. Section 5(f) provided that Hawaii would manage *and dispose of* its granted lands consistent with public trust purposes specified in the Act. Pet. App. 116a. The unmistakable intent of the Act and the understanding of the voters is that

Hawaii would receive title to the lands to manage and sell for the benefit of all citizens of Hawaii, including those descended from native Hawaiians. *See Rice v. Cayetano*, 528 U.S. 495, 525 (2000) (Breyer, J., concurring) ("The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are 'native.'").[1]

2. Interpreting The 1993 Apology To Require Hawaii To Hold The Lands Is Inconsistent With The Admission Act Provisions Granting The Land And Authority To Sell And Lease

Congress adopted the 1993 Apology Resolution thirty-four years after Hawaii's statehood. The resolution "acknowledges the historical significance" of the overthrow of the 1893 Hawaiian monarchy. Pet. App. 110a (Section 1(1)). Noting the participation of United States citizens in the 1893 overthrow, the resolution extends an apology to "any individual who is a descendent of the aboriginal people" of the islands. Pet. App. 110a (Section 2).

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[1] The amici recognize that the Admission Act allows the State of Hawaii to use its lands for five purposes, one of which is the betterment of the conditions of native Hawaiians where that purpose is not inconsistent with the other purposes. Pet. App. 116a (Section 5(f)). Hawaii's discretion to use lands for the allowed purposes, however, is not relevant to this case. The lower court explicitly based its injunction on its erroneous view that unrelinquished claims clouded title to the lands and that the state's lands must be held to resolve such claims.

Relying solely on recitals in the Apology Resolution that broadly summarize the historic events, the court below held that Congress had "recognized that the native Hawaiian people have unrelinquished *claims over the ceded lands* . . . ." Pet. App. 32a (emphasis added). Thus, based on its view that the resolution recognized these unrelinquished claims, the court directed Hawaii to hold its state lands as a "*foundation* (or starting point) for reconciliation" of those claims. Pet. App. 33a. By reading the Apology Resolution as holding Hawaii's lands as a "foundation" for resolution of land claims, the court adopted an interpretation inconsistent with the purposes of granting the land at statehood and the explicit provisions of the Admission Act.

The Admission Act granted the lands to Hawaii and required Hawaii to use the lands

> "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use." Pet. App. 116a.

Hawaii's title and authority over its lands is explicitly granted by these provisions of the Admission Act. The Act provides that "lands, proceeds, and income *shall be managed and disposed*

of for one or more of the foregoing purposes . . . ." Pet. App. 116a (emphasis added).

If the Apology Resolution requires Hawaii to hold its lands for resolution of land claims, then the resolution has impliedly repealed these provisions of the Admission Act. To support schools and institutions with the land and its proceeds, Section 5(f) necessarily authorized Hawaii to sell and lease the land. To develop farm and home ownership, make public improvements, and allow public use, the Admission Act necessarily granted Hawaii full title, as well as authority to sell and lease. Apart from the Hawaii court's view of recitals in the later Apology Resolution, nothing in the Admission Act itself suggests Hawaii received anything less than clear title. To the contrary, in light of its purpose to grant lands to a new state, the Admission Act is susceptible to but one conclusion—Congress granted the new state of Hawaii full and perfect title, just as it granted lands to other states upon admission to the Union.[2]

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[2] Notably, the Hawaii Admission Act omits a provision found in other admission acts where the United States was concerned with Native American lands. *See, e.g.*, Enabling Act for Admission of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 4(2), 25 Stat. 676 (1889) (the people of the new states "forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States"). In the 1959 Hawaii Admission Act, Congress did not address native Hawaiians as landholders. Instead, native Hawaiians were, together with all people, the beneficiaries of the grant of state lands. Pet. App. 116a. Furthermore, native Hawaiians were to benefit from the

The Hawaii court thus erred by adopting an unwarranted reading of the Apology Resolution. It read the resolution as if that later congressional action had repealed, by implication, the grant of lands in the Admission Act. The resolution did not, by implication, change the express grant of lands in the Admission Act. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533.

3. The Plain Language Of The Apology Resolution Does Not Recognize Claims To The Lands Previously Granted By The Admission Act

The plain language of the Apology Resolution does not amend the Admission Act, or make more than a passing reference to the admission of Hawaii into the Union. A natural reading of the Apology Resolution, therefore, confirms that Congress had no intent to affect the land previously granted to Hawaii under the Admission Act. It simply intended to apologize.

The Apology Resolution includes a number of recitals describing two centuries of complex history. After the recitals, the resolution simply states that Congress offers an apology to acknowledge that the overthrow of the Hawaiian monarchy has "historical significance". Pet. App. 110a. This modest language, together with the absence of any language directed to the Admission Act provisions, confirms that Congress intended no substantive effect on the

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Hawaiian Homes Commission Act, 1920, referenced in the Admission Act. Pet. App. 114a.

state's lands. Congress merely commits to "acknowledg[ing] the ramifications of the overthrow" in the future. Pet. App. 110a. Similarly, Congress "urges the President [to] acknowledge the ramifications of the overthrow [and] to support reconciliation efforts". Pet. App. 110a. Whatever salutary effect this language may have as an apology, it is plainly not intended to change the Admission Act or affect the title or use of lands granted at statehood.

The Hawaii court, however, couches its ruling by saying "the Apology Resolution is not *per se* a *settlement* of claims, but serves as the *foundation* (or starting point) for reconciliation, including the future settlement of the plaintiffs' unrelinquished claims." Pet. App. 33a–34a. To achieve this conclusion, the court below cites recitals implying the Republic of Hawaii wrongly ceded its government lands to the territorial government, and reciting that native Hawaiian people "never *directly* relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States[.]" Pet. App. 108a (emphasis added). The concordance between recitals used in the Apology Resolution and the elements of history argued by the groups challenging the state's title, however, does not imply that the resolution recognizes legal claims contrary to the Admission Act grant. The resolution states only that claims are "unrelinquished" from one point of view, and does not imply that it is recognizing any legal claim to the state's lands.

The Apology Resolution is easily harmonized with the Admission Act. The Admission Act granted the land to Hawaii. The Apology Resolution

respectfully acknowledges the significance of historic events to a particular group of people. The court below erred by viewing these recitals as if Congress had recognized claims clouding the title granted in the Admission Act.[3]

B. The Decision Below Is Contrary To Decisions Of This Court Concerning The Power Of Congress To Diminish Title Granted At Statehood

The decision of the Hawaii court also conflicts with this Court's decisions in two significant respects. First, the Court has held that Congress cannot take back lands granted at statehood. Second, the Court has held that lands granted at statehood are to be used for the purposes enumerated in the Admission Act.

With regard to submerged lands, "Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State." *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) (alteration in original); *see also id.* at n.9 (recognizing entire Court agrees on this

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[3] The Hawaii court's reading of the Apology Resolution is equally inconsistent with a line of federal enactments stretching back to the Newlands Resolution, which annexed the Territory of Hawaii. As shown by the petitioner, the line of federal enactments extinguishes any inconsistent claims to the lands, such as a claim of unextinguished aboriginal title on behalf of the original inhabitants. *See generally* Br. Pet'r 31–46. The amici states focus on the Admission Act because, when the Act is read according to its plain language and in light of congressional purposes to admit a new state and the power of Congress, the Admission Act alone shows that the United States granted Hawaii perfect title to the lands.

principle). There is no reason why the statement in *Idaho* does not apply with equal force to land granted by the United States for state purposes such as funding schools and state institutions. Both submerged lands and lands granted for state purposes are intended to serve fundamental attributes of sovereignty for a new state. The Court should therefore reject the Hawaii court's reading of the Apology Resolution and apply the rule that Congress cannot, after statehood, reserve or convey interests in lands that "'ha[ve] already been bestowed' upon a State." *See Idaho*, 533 U.S. at 280 n.9 (alteration in original); *see also* Part C *infra*.

Similarly, the decision below is contrary to this Court's decisions that if federal law enumerates the purpose for which lands are granted to a state, the enumerated purpose "is necessarily exclusive of any other purpose". *Ervien v. United States*, 251 U.S. 41, 47 (1919); *see also Lassen*, 385 U.S. at 467 (applying the rule from *Ervien*). Both *Ervien* and *Lassen* dealt with lands granted at statehood subject to enumerated conditions like the conditions in Section 5(f) of the Hawaii Admission Act. In both cases, the Court held the terms for using the land imposed by the laws granting land at statehood preclude inconsistent purposes imposed by the states after statehood.

The rule from *Ervien* and *Lassen*, however, applies equally to the question of whether the Apology Resolution directs Hawaii to hold its state lands for the purposes of resolving native Hawaiian claims. The grant of lands at statehood is a "solemn agreement" between the people of the new state and

the rest of the Union. *Andrus v. Utah*, 446 U.S. 500, 507 (1980). The grantee—a state—cannot alter terms of that solemn agreement by directing the lands to be used for a new purpose selected by the grantee. So too, the United States cannot alter the terms of the statehood agreement and direct the granted lands to a new purpose. The enumeration of the conditions for using the land in the agreement creating a state equally restricts the state and the federal government from unilaterally altering the conditions of the grant.[4]

C. The Hawaii Court's Decision Is Inconsistent With The Constitutional Plan Of Federalism

The Hawaii court's decision that the Apology Resolution recognized claims to state lands should be rejected because that decision is squarely inconsistent with the constitutional plan of federalism. The decision takes from Hawaii fundamental attributes of its sovereignty over its lands. If correct, the decision below suggests that the United States has commandeered state lands to remedy a problem created entirely by the United States, one that the state had no hand in making and that it has no legal obligation to rectify.

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[4] The position of amici curiae does not conflict with congressional power to extend regulations of general applicability to state lands. *See Case v. Bowles*, 327 U.S. 92, 100 (1946). Nor does the position conflict with federal power to condemn state lands by paying just compensation. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). The Apology Resolution does not purport to regulate or condemn lands.

1. Hawaii Entered The Union With All The Attributes Of A Sovereign State Including Title To Its Lands

The sovereignty of the states of the Union starts from the principle that the states have all of the attributes of sovereignty except those surrendered in the Constitution.

> "The States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; and they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions[.]" *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 318–19 (1867).

This principle applies equally to every state because a state can be admitted "only on the same footing with" the original states. *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. (17 Otto) 678, 689 (1883). The principle of equal sovereignty of the states is thus, as old as the Constitution itself. *See, e.g.*, 1 Stat. 491 (1796) (admitting Tennessee on an "equal footing"); 2 Stat. 701, 703 (1812) (admitting Louisiana); *United States v. Texas*, 143 U.S. 621, 634 (1892) (citing 9 Stat. 108, which admits the former Republic of Texas "into the Union on an equal footing with the original states in all respects whatever"). The states are to be "equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to

the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). "To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission." *Id.*

Therefore, when Congress admitted Hawaii on "an equal footing with the other States in all respects whatever" (Pet. App. 113a), Hawaii received the same attributes of sovereignty held by the other states. The attributes of each state's sovereignty include the right to own lands free and clear from later actions of Congress that would reserve or convey the state's lands. *See Idaho*, 533 U.S. at 280 (submerged lands)[5]; *see also Wilcox v. Jackson ex dem. M'Connel*, 38 U.S. (13 Pet.) 498, 517 (1839) (the laws of the United States control the question of whether title to land has passed, but once title has passed "then that property, like all other property in the State, is subject to State legislation . . .

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[5] With regard to submerged lands, the original states and the subsequent states hold title and sovereignty over navigable waters and submerged lands, and the United States cannot refrain from granting such title to a new state. *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845). There is "not the slightest suggestion" that the state's title to such submerged lands is "defeasible". *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). Although the Constitution itself grants submerged lands to the states, the grant of lands in the Hawaii Admission Act is equally complete and not defeasible.

consistent with the admission that *the title passed and vested* according to the laws of the United States" (emphasis added)). The attributes of a state's ownership of its land necessarily include the power to possess, use, and dispose of the land. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (property includes the rights "to possess, use and dispose"); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (an interest in real property is taken when a law eliminates all right to devise the property).

The Apology Resolution and the Admission Act should be read together and consistent with the plan of federalism. The title to lands granted to a state vest in the state. The states have not surrendered their sovereignty over lands and therefore a later act of Congress cannot reserve or convey—or recognize—legal rights that would contradict the title received at statehood. The Hawaii court, thus, erred by viewing the resolution to recognize claims to the state land.

2. A Post Admission Act Resolution Recognizing Or Validating Claims To Lands Granted At Statehood Would Impermissibly Impair State Sovereignty

The Hawaii court's interpretation of the Apology Resolution as recognizing a legal claim and cloud on title should be rejected because the interpretation assumes a federal power to commandeer state lands for a federal purpose, a power that the federal government does not possess. *See New York v. United States*, 505 U.S. 144 (1992). *New York* held that Congress lacked the power to

transfer title to low level radioactive waste to the states. A federal law compelled the states to take title to this personal property. The Court held that the law was contrary to the principle that Congress may legislate, but "it may not conscript state governments as its agents." *Id.* at 178. The Hawaii court's view of the Apology Resolution assumes just such a conscription of the state of Hawaii and its lands to accomplish a federal purpose.

In this respect, the conclusion of the Hawaii court is predicated on an impermissible view of the Apology Resolution. Congress does not seek to take back state lands or conscript the lands for a federal purpose. Instead, Congress presumably acts to preserve the states as part of an "indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

> "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *White*, 74 U.S. at 725.

Congress should not be viewed as wielding power in a manner that would destroy a state. "[N]either [the state nor federal] government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("States retain

substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."). Consistent with the plan of federalism, Congress granted the new state of Hawaii perfect title and statehood. The Apology Resolution does not recognize claims that would cloud Hawaii's title.

CONCLUSION

The amici states urge the Court to reverse the opinion and judgment of the Supreme Court of Hawaii.

RESPECTFULLY SUBMITTED.

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December 11, 2008

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